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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 976.

RALPH L. SHAINWALD, RECEIVER, &c., AND HERMAN SHAINWALD, ASSIGNEE, &c., INTERVENORS; J. A. WRIGHT, ISAAC HOFFMAN, AND S. HOFFMAN, COMPOSING THE FIRM OF HOFFMAN BROTHERS, ET AL., APPELLANTS,

vs.

ISAAC J. LEWIS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEVADA.

FILED OCTOBER 5, 1882.

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1 In the district court of the 5th judicial district of the State of Nevada, in and for the county of Lander.

ISAAC J. LEWIS
v.
HARRIS LEWIS, ABRAHAM COLEMAN, J. A. Wright, Isaac Hoffman, & C. Hoffman, comprising the firm of Hoffman Bros., Joseph Huber, Chas. Sadler, A. & M. Sower, R. Hogan, J. D. Pringle, Chas. Polkinghorne, B. C. Thomas and James Brennan.

The complaint of Isaac J. Lewis respectfully shows to the court that on or about the first day of January, 1880, the plaintiff and defendant Harris Lewis entered into a copartnership in trade in the general business of buying and selling merchandise to be carried on at Austin, in the State of Nevada. That by the terms of said copartnership each of said parties was to receive one-half of the net profits of said business. That said business was carried on in a certain store or building occupied by said partners in said Austin, from said date until interrupted as hereinafter set forth. That between said 1st day of January, 1880, and the 5th day of Novem-
2 ber, 1880, said copartnership purchased on credit and received at their said store various articles of merchandise, of the value of about twenty thousand dollars from various merchants and firms carrying on business in the city and county of San Francisco, State of California.

That all the claims of said merchants for said merchandise so sold to said firm have been transferred to and are now held by the defendant Abraham Coleman, and are yet unpaid and are now due and owing to him from said firm. That there are other debts due from said firm to sundry other creditors, namely, to Buell Manufacturing Co., $23.70; J. M. Lewis, $2,200.00; I. J. Lewis, pl't'ff, $7,500.00, and possibly to others whose names plaintiff cannot now recollect. That for the purpose of carrying on the business of said copartnership, paying debts and purchasing merchandise for cash, it become necessary for said copartnership to borrow money, and for said purpose it did borrow from the firm of Lazard Freres, the sum of five thousand dollars; from M. Lewis the sum of two thousand dollars; from M. Friedlander & Co., the sum of $944.38; A. Cook, $1,140.32; W. Cohn, the sum of . That all of said moneys were used in the business of said copartnership, and said claims therefor were also transferred to said Abraham Coleman, and said claims are now
3 owned by him and have never been paid, or settled, or discharged.

That prior to January 1st, 1880, said Harris Lewis had become involved in certain business complications, to which the plaintiff was a stranger, and therefrom resulted litigation which culminated in a judgment against said Harris Lewis only, and in favor of one Herman Shainwald, as assignee in bankruptcy of the firm of Schoenfeld, Cohn & Co., and of Louis S. Schoenfeld, Isaac Newman, and Simon Cohn, on the 5th day of November, 1880, rendered in the district court of the United States for the district of California. That on said judgment another action was commenced on or about the day of November, 1880, in the district

court of the United States for the district of Nevada, in the nature of a creditor's bill on said judgment and upon the filing of said bill and before service of process upon said Harris Lewis, who then was a citizen and resident of the district and State of California and has since then to the present time continued to be and who since then has not been within the district of Nevada, an injunction was issued and R. L. Shainwald, a brother of said Herman Shainwald, was appointed receiver of all the estate, real and personal, of said Harris Lewis in said district of Nevada, ex parte and without notice.

4 Thereupon said R. L. Shainwald, acting as plaintiff, is informed and believes, under the authority of said appointment as receiver, made by said district court of the United States for the district of Nevada, gave to one James L. Crittenden power to act for him, said receiver, and said Crittenden thereupon forcibly entered into the store occupied by said firm under the charge and supervision of said plaintiff, and claiming to act under authority derived from said receiver, forcibly and by violence and with threats and the exhibition of deadly weapons drove the plaintiff out of said store and took possession thereof, and seized upon all the merchandise therein contained, and also the letters and books of account belonging to said firm, and blew open the safe of said firm and abstracted therefrom the sum of over twelve hundred dollars, some of which belonged to said firm, but the greater part thereof belonging to third persons who had entrusted the same to this plaintiff for safe keeping and shipped said coin, said letters, and books out of said State, and, as this plaintiff is informed and believes, to the city of San Francisco, in the State of California, also jewelry and diamonds.

That the plaintiff thereafter essayed to enter said premises, but was repelled and ejected therefrom by said Crittenden and his agents and employés, who continued to hold possession by force and arms.

5 Thereupon an application was made to the district court of the United States for the district of Nevada, to vacate said order of said court appointing said receiver, and on or about the 11th day of December, 1880, said court vacated said order and discharged said receivership. Thereupon the plaintiff caused the deputy marshal of the United States to serve upon the agents and employés of said receiver and the brother of the receiver, who was the plaintiff in said action and who had been placed by said receiver in charge of said store and of said stock of goods, a copy of said order discharging and vacating said appointment of said H. Shainwald as receiver and plaintiff demanded possession of said store, but said Shainwald and his agents and employés refused to surrender said merchandise and said store, and continued by force and violence to hold the same and to keep this plaintiff deprived of the possession thereof, and said agents and employés of said R. L. Shainwald thereupon proceeded to advertise for sale said merchandise, and said plaintiff, through the newspapers and otherwise, cautioned all persons not to buy the same, and also cautioned all persons owing any debts to the firm of H. Lewis & Co. not to pay the same to said Shainwald. That said Shainwald for the

6 purpose of paying said judgment in favor of said H. Shainwald, and against said Harris Lewis, to the injury of the joint creditors of the partnership, proceeded without any authority of law to sell and pretended to sell the interest of said Harris Lewis in a large portion of said merchan-

dise, and delivered the possession of said merchandise to sundry persons, who thereby falsely claimed to have become seized of the interest of said Harris Lewis therein. The plaintiff further alleges that in consequence of the notices given by plaintiff and the uncertainty as to the title of said Shainwald to said merchandise, and his right to sell the same, said merchandise brought only from 15 to 33 per cent. of its market value. That, as plaintiff is informed and believes, about $15,000.00 worth of said merchandise was sold or pretended to have been sold for about 3,000 dollars, and was carried away by the purchasers, and said coin was carried off by said Shainwald and placed beyond the jurisdiction of said district court of Nevada, and said Shainwald is pecuniarily irresponsible.

That the following persons and firms received from said Shainwald and carried away and appropriated different articles of the property belonging to said firm, on or about the 13th day of December, 1880, all of
7 which articles were of the value as hereinafter mentioned. The defendant J. A. Wright received and carried away and appropriated jewelry of the value of six thousand dollars and a fancy show-case of the value of $150.

The firm of Hoffman Bros. carried away and appropriated to their own use wall-paper of the value of $1,200.00.

That the defendant Sadler carried away and appropriated to his own use cigars of the value of $400.00.

That the defendant J. Huber carried away and appropriated to his own use carpets, oil-cloths, and other merchandise, to the value of $2,500.00.

That the firm of A. & M. Sower carried away and appropriated to their own use cutlery, perfumery, stationery, show-case, combs, brushes, pictures, and pipes of the value of about two thousand dollars.

That R. Hogan carried away and appropriated to his own use boots and shoes, about eight cases, of the value of about six hundred dollars.

That Charles Polkinghorne carried away and appropriated to his own use boots and shoes of the vaiue of about two hundred dollars.

That it is impossible to proceed with the business of said copartnership, and the same ought to be dissolved; that the stock and effects of said partnership ought to be sold, and the proceeds ought to be applied
8 in payment of said partnership debts, and the surplus divided between said I. J. Lewis and said Harris Lewis or his legal representatives and successors in interest.

That said Shainwald was not entitled to seize said effects and merchandise, nor had any interest therein; that all of said goods, wares, and merchandise, sold and unsold, are the property of said firm, but are no longer in the possession of the plaintiff nor the defendant Harris Lewis, but in the possession of irresponsible third persons, who claim to hold the same under pretended authority of said Shainwald as receiver.

That said persons have already sold and wasted and lost a large part of said stock, and threaten to again commence to sell the same, and it is necessary the court should appoint a receiver forthwith, should sell out said stock, and receive the proceeds thereof into court, to be disposed of according to justice and equity and the liens of the creditors and partners.

Wherefore the plaintiff prays that the partnership be dissolved, the accounts of said copartnership be taken, and stated both between said firm

and all creditors, and between the individual members of said firm and the private creditors of each, and also as between said copartners; that a receiver be appointed, and that he take possession of all the stock
9 and effects of said firm, and proceed to collect all property and merchandise, or the value thereof, carried away and appropriated to their own use by any persons; or, in default thereof, that an account be stated between said copartnership and said persons receiving said goods wherein they be charged with the value thereof, and also to collect all debts due to said firm.

That said stock and merchandise on hand be sold, and said property so carried away and appropriated, when recovered, be sold, or that the accounts due from any persons by reason of taking and appropriating the same be collected; that the proceeds be applied in payment of the debts of said copartnership; that the surplus due plaintiff be paid to him, and the surplus due Harris Lewis be paid to his individual creditors, as the court shall order.

That J. D. Pringle, B. C. Thomas, and James Brennan, in charge of said goods, be restrained from selling or disposing of the same, and that they turn them over to said receiver.

That the plaintiff have such other and further and general relief as he may be entitled to in the premises.

DELOS LAKE,
Pl'ff's Att'y.

10 STATE OF NEVADA,
County of Lander, ss:

I. J. Lewis, being duly sworn, doth depose and say that he is the plaintiff herein, that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge save as to the matters therein stated to be on information and belief, and as to those matters he believes it to be true.

I. J. LEWIS.

Sworn to before me this 6th day of January, 1881.

D. C. McKINNEY,
Dist. Judge.

Clerk's office of the district court of the fifth judicial district in and for the county of Lander, ss:

I, the undersigned, clerk of said court, do hereby certify the foregoing to be a true and correct copy of the original complaint in the above-entitled cause now on file in my office.

Attest my hand and seal of said court this day of January 18th, A. D. 1881.

[SEAL.] J. A. MILLER, *Clerk.*

(Endorsed:) 1599. 5th judicial dist. court. I. J. Lewis vs. H. Lewis. Complaint. Delos Lake, pl'ff's att'y. Filed Jan'y 15, 1881. J.
11 A. Miller, clerk. Filed Jan'y 20, 1881. T. J. Edwards, clerk U. S. cir. court, dist. Nevada.

In the district court of the fifth judicial district of the State of Nevada, in and for the county of Lander.

The State of Nevada sends greeting to Harris Lewis, Abraham Coleman, J. A. Wright, Isaac Hoffman & N. Hoffman, comprising Hoffman Bros., Joseph Huber, Charles Sadler, A. & M. Sower, R. Hogan, J. D. Pringle, and Charles Polkinghorne, B. C. Thomas & James Brannen.

You are hereby required to appear in an action commenced against you, as defendants, by I. J. Lewis as plaintiff, in the district court of the fifth judicial district, in and for the county of Lander, State of Nevada, at the city of Austin, and answer the complaint therein, which is on file with the clerk of said court, within ten days of the service on you of this summons (exclusive of the day of service,) if served in said county, or twenty days it served out of said county, but within this district, and in all other cases forty days, or judgment by default will be taken against you, according to the prayer of said complaint.

12 The said action is brought to recover judgment against you, the said defendant, H. Lewis, for a dissolution of the copartnership existing between you & said plaintiff for the taking of an account of said copartnership between themselves & their creditors, individual & firm & also as between themselves. That a receiver be appointed with the usual powers to take possession of said copartnership property & effects, & ag'st the other defendants for the property appropriated by you; or any of you; to collect from you by said receiver all property or merchandise of said firm, or the value thereof, carried away & appropriated to your own use, or in default thereof that an account be stated between said copartnership & said defendants, wherein you, said defendants, be charged with the value of said property, & collect all debts due said firm. That the stock now in charge of J. D. Pringle, B. C. Thomas, & J. Brannen, one of defendants, be sold, & said property carried away by defendants when recovered be sold, or that the accounts due from any persons or defendants by reason of carrying the same away & appropriating the same be collected. That the proceeds be applied to the payment of the copartnership debts first.

13 That the surplus due plaintiff be paid to him, & the surplus due Harris Lewis be paid to his individual creditors as the court shall order, & for an order restraining defendant, J. D. Pringle, B. C. Thomas, & James Brannen, from selling said property or interfering therewith, & that he turn the same over to the receiver, and for such other relief as may be just, & as more fully appears by the complaint herein filed, reference to which is hereby made. And you are hereby notified that if you fail to appear and answer the said complaint as above required, the said plaintiff will apply to the court for the relief demanded in the complaint.

In testimony whereof I, J. A. Miller, have hereunto set my hand and affixed the seal of said court this 15th day of January, A. D. 1881.

[SEAL.] J. A. MILLER,

Clerk District Court of the Fifth Judicial District, Lander County, State of Nevada.

Clerk's office of the district court of the fifth judicial district in and for the county of Lander, ss:

I, the undersigned clerk of said court, do hereby certify the foregoing to be a true and correct copy of summons in the above-entitled cause.

14 Attest my hand and the seal of said court this day, January 18th' A. D. 1881.

[L. S.] J. A. MILLER, *Clerk.*

(Endorsed:) In the fifth district court, county of Lander. I. J. Lewis vs. H. Lewis & al. Summons: Delos Lake, attorney for pl'ff. Filed Jan'y 20, 1881. T. J. Edwards, clerk, U. S. cir. court, dist. Nevada.

In the district court of the 5th judicial district in and for the county of Lander, State of Nevada.

I. J. LEWIS
vs.
HARRIS LEWIS, ABRAHAM COLEMAN, J. A. Wright, Isaac Hoffman, and L. Hoffman, comprising the firm of Hoffman Bros., Joseph Hubor, Charles Sadler, A. and M. Sower, R. Hogan, J. D. Pringle, and Charles Polkinghorn, B. C. Thomas, and James Brennan.

Now comes the above-named defendants, J. A. Wright, Isaac Hoffman' L. Hoffman, Joseph Huber, Charles Sadler, A. and M. Sower, R. Hogan' J. D. Pringle, Charles Polkinghorn, B. C. Thomas, and James
15 Brennan, and for answer to pl'ff's complaint herein aver that heretofore Herman Shainwald was duly appointed assignee in bankruptcy in the matter of the bankruptcy of the firm of Schoenfeld, Cohn & Co., and Lewis L. Schoenfeld, Isaac Newman, and Simon Cohen, in the district court of the United States for the district of California; that on the 16th day of Nov., 1880, Ralph L. Shainwald was appointed receiver of the property of said Harris Lewis, defendant in the case of Herman Shainwald, as assignee in bankruptcy against Harris Lewis, in the said United States district court; that on or about the 22d day of November, 1880, said receiver, Ralph L. Shainwald, by the authority of said appointment, took possession of all of the property mentioned in said complaint as the property of the said Harris Lewis; that since said date the said Ralph L. Shainwald, as receiver, was and still is in the possession of said property as such receiver. The said Herman Shainwald, as such assignee, on the day of December, 1880, commenced a suit in the district court of the 5th judicial district in and for the county of Lander, State of Nevada, against the said Harris Lewis, and caused an attachment to issue therein for the of 81,425.07 dollars and 17,099.26 dollars interest; that said writ of attachment was on said day duly levied upon said
16 property by B. C. Thomas, sheriff of said Lander County, and that said Thomas is now in possession of said property under and by virtue of said writ of attachment, and has been ever since said date jointly in possession thereof with said receiver.

Said defendants further answering said complaint, deny that on the first day of January, 1880, or at any other time, said plaintiff and defendant, Harris Lewis, entered into any copartnership, and deny that they were to receive one-half of any profits of any business. Deny that any business was carried on by them in the store mentioned in the complaint or elsewhere at the time mentioned in the complaint, or at any time. Deny that between the 1st of Jan'y, 1880, and the 5th of Nov., 1880, or at any other time, said I. J. Lewis, and Harris Lewis, purchased on credit, and received at said store any articles of merchandise. Deny said receiver, or Crittenden, named in said complaint, forcibly entered said store, or forcibly, or by violence, or threats, or the exhibition of deadly weapons, or at all, drive the plaintiff out of said store, or seized upon the merchandise contained therein, or any property whatever; but defendants allege that said Crittenden was duly appointed agent by said receiver, Shain-
17 wald, and as such did take possession of said store, and the property therein contained peaceably and by no force or threats, and that said plaintiff gave up the possession thereof to said Crittenden as the property of said Harris Lewis. Defendants deny that said receiver proceeded without authority of law to sell the said property, or any part thereof, but alleges that by virtue of his authority as such receiver he sold part of said property.

Defendants deny that said property was sold for less than its actual value. Defendants deny that $15,000.00 of said goods was sold or pretended to have been sold for $3,000.00. Defendants deny that said receiver, Ralph L. Shainwald is pecuniarily irresponsible, but avers that he has filed a good and sufficient bond in the district court of the United States for the district of California, to pay all losses or injuries which might be sustained by reason of his acts as such receiver. Defendants deny that any part of said property was the property of the alleged partnership, but they allege that it was the property of the said Harris Lewis at the time when the receiver took possession thereof as aforesaid. Defendants deny that J. A. Wright received or carried away, or appropriated jewelry of the value of $6,000, or any other value, except such
18 as he paid full value for. Defendants deny that the firm of Hoffman Bros., carried away or appropriated to their own use, wall-paper of the value of $1,200 *dollars*, or any other value, except such as they paid full value for. Defendants deny that def't Sadler carried away or appropriated to his own use cigars of the value of $400, or any other value, except such as he paid full value for. Defendants deny that def't J. Huber carried away, or appropriated to his own use, carpets, oil-cloths, or other merchandise of the value of $2,500, or any other value, except such as he paid full value for.

Defendants deny that the firm of A. and M. Sower carried away or appropriated to their own use cutlery, perfumery, stationery, show-case, combs, brushes, pictures, and pipes of the value of $2,000, or any other value, except such as he paid full value for. Def'ts deny that R. Hogan carried away or appropriated to his own use boots and shoes of the value of 600 dollars, or any other value, except such as he paid full value for.

Defendants deny that Charles Polkinghorn carried away or appropriated to his own use boots and shoes of the value of 200 dollars, or any other value, except such as he paid full value for.

19 Wherefore defendants pray that they be hence dismissed, and for judgment against plaintiff for their costs in this action, and for such other and further relief as to justice belongs.

H. T. CRESWELL,
Att'y for Defendants.

STATE OF NEVADA,
County of Lander, ss:

J. D. Pringle, being duly sworn, says he is one of the defendants in the above-entitled action; that the foregoing answer is true of his own knowledge, except as to the matter are therein stated on information or belief, and as to those matters he believes it to be true.

J. D. PRINGLE.

Sworn and subscribed to before me this 17th day of January, A. D. 1881.

[SEAL.] J. A. MILLER, *Clerk.*

Clerk's office of the district court of the fifth judicial district in and for the county of Lander, ss:

I, the undersigned clerk of said court, do hereby certify the foregoing to be a true and correct copy of the answer in the above-entitled cause now on file in my office.

20 Attest my hand and seal of said court this 18th day of Jan'y, A. D. 1881.

[L. S.] J. A. MILLER, *Clerk.*

(Endorsed:) 1599. I. J. Lewis vs. Harris Lewis et al. Answer. Filed Jan. 17, 1881. J. A. Miller, clerk. Filed Jan'y 20, 1881. T. J. Edwards, clerk U. S. cir. court, dist. Nevada.

In the district court of the 5th judicial district in and for the county of Lander, State of Nevada.

I. J. LEWIS
v.
HARRIS LEWIS, ABRAHAM COLMAN, J. A. Wright, Isaac Hoffman and C. Hoffman, comprising the firm of Hoffman Bros., Joseph Huber, Charles Sadler, A. and M. Sower, R. Hogan, J. D. Pringle, and Charles Polkinghorne, B. C. Thomas, and James Brennan, and Ralph L. Shainwald and Herman Shainwald, intervenors.

Now comes Herman Shainwald and Ralph L. Shainwald, and shows to the court that they are entitled to intervene in said action, because
21 they have an interest in the matter in litigation and an interest against both parties to said action, and ask to be made parties defendant to said action.

Petitioners aver that heretofore the said Herman Shainwald was duly appointed assignee in bankruptcy in the matter of the bankruptcy of the

firm of Schoenfeld, Cohen & Co. and Louis S. Schoenfeld, Isaac Newman, and Simon Cohen, in the district court of the United States for the district of California.

That on the 16th day of Nov., A. D. 1880, the said Ralph L. Shainwald was appointed receiver of the property of Harris Lewis in the case of Herman Shainwald as assignee in bankruptcy against Harris Lewis, in the said United States district court. That on or about the 22d of November, A. D. 1880, said receiver, Ralph L. Shainwald, by authority of said appointment took possession of all the property mentioned in said complaint as the property of the said Harris Lewis. That ever since said date the said Ralph L. Shainwald, as receiver, was, and still is, in the possession of said property as such receiver. That said Herman Shainwald, as such assignee, on the 13th day of December, A. D. 1880, commenced a suit in the district court of the 5th judicial district in and for the
22 county of Lander, State of Nevada, against said Harris Lewis, and caused an attachment to issue therein for the sum of $81,425.07, and the further sum of $17,099.26 *dollars* interest on the aforesaid amount of $81,425.07 *dollars*. That said writ of attachment was on the same day duly levied upon said property by B. C. Thomas, sheriff of said Lander County, and that said Thomas is now in the possession of said property under and by virtue of said writ of attachment, and has been ever since said date, jointly with said receiver, in possession thereof.

Petitioners, for answer to the complaint, deny that on the 1st day of January, 1880, or at any other time, said plaintiff and defendant, Harris Lewis, entered into any copartnership, and deny that they were to receive one-half of any profits of any business.

Deny that any business was carried on by them in the store mentioned in the complaint, or elsewhere, at the time mentioned in the complaint, or at any time.

Deny that between the 1st of Jan'y, 1880, and the 5th of November, 1880, or at any other time, said I. J. Lewis and Harris Lewis purchased on credit and received at said store any articles of merchandise.

Said petitioners deny that said receiver, or Crittenden named in
23 said complaint, forcibly entered said store or forcibly or by violence or with threats or the exhibition of deadly weapons or at all drove the plaintiff out of said store, or seized upon the merchandise contained therein, or any property whatever; but petitioners allege that said Crittenden, having been duly appointed agent by said receiver, Shainwald, did take possession of said store and the property therein contained peaceably, and by no force or threats, and that said plaintiff gave up the possession thereof to said Crittenden as the property of the said Harris Lewis.

Petitioners deny that said receiver proceeded without authority of law to sell the said property, or any part thereof, but allege that by virtue of the authority as receiver as aforesaid he sold part of said property, and deny that said property was sold for less than its actual value. Petitioners deny that $15,000 of said goods were sold or pretended to have been sold for $3,000. Petitioners deny that said receiver, Ralph L. Shainwald, is pecuniarily irresponsible, but aver that he has filed a good and sufficient bond in the district court of the United States for the district of California to pay all losses or injuries which might be sustained by

24 reason of any of his acts as such receiver. Petitioners deny that any part of said property was the property of said alleged partnership, but they allege that it was the property of said Harris Lewis at the time when the receiver took possession thereof, as aforesaid.

Wherefore petitioners pray that they may be permitted to intervene and become parties to said action by uniting with the defendants for the purpose of resisting the claim of plaintiff; that said receiver Shainwald be adjudged to have the rightful possession of said property as such receiver, and for the costs of these proceedings, and for such other and further relief as may be equitable.

HARRY T. CRESWELL,
Att'y for Petitioners.

STATE OF NEVADA,
County of Lander, ss:

H. T. Creswell, being duly sworn, says that the above-named petitioners are not in the county of Lander, where their att'y resides. Wherefore he makes this affidavit. That the foregoing petition is true of his own knowledge except as to the matters which are therein stated on information and belief, and as to those matters he believes it to be true.

H. T. CRESWELL.

25 Subscribed and sworn to before me this 17th day of January, A. D. 1881.

[SEAL.] J. A. MILLER, *Clerk.*

(In pencil:) Filed January 17th, A. D. 1881.

(Endorsed:) Filed Jan'y 17, 1881. J. A. Miller, clerk.

Clerk's office of the district court of the fifth judicial district in and for the county of Lander, ss:

I, the undersigned clerk of said court, do hereby certify the foregoing to be a true and correct copy of petition of intervention in the above-entitled cause, now on file in my office.

Attest my hand and seal of said court this 26th day of January, A. D. 1881.

[L. S.] J. A. MILLER, *Clerk.*

(Endorsed:) I. J. Lewis vs. H. Lewis et al. Petition of intervention. Copy. Filed Jan'y 28, 1881. T. J. Edwards, clerk U. S. cir. court, dist. Nevada.

26 *Agreed amendment to petition for intervention of Ralph L. Shainwald.*

Alleges that on the day of November, 1880, and before the commencement of this action, the said Harris Lewis, in obedience to an order duly made by the Hon. Ogden Hoffman, district judge of the United States in and for the district of California, made and executed an assignment to Ralph L. Shainwald, receiver as aforesaid, by which he, the said Harris Lewis, conveyed, assigned, transferred, and delivered over unto the said Ralph L. Shainwald, his successor, successors, and assigns, all and

every and all manner of estate and property, real and personal, things in action, debts, equitable interests, and other effects, and all bills, notes, contracts, books of account, and other evidences relating thereto, of the said Harris Lewis.

Allowed this 25th day of January, A. D. 1881.

D. C. McKENNEY,
District Judge.

Clerk's office of the district court of the fifth judicial district in and for the county of Lander. ss:

I, the undersigned, clerk of said court, do hereby certify the
27 foregoing to be a true and correct copy of amendment to petition for intervention in the above-entitled cause, now on file in my office.

Attest my hand and seal of said court this 26th day of January, A .D. 1881.

[L. S.] J. A. MILLER, *Clerk.*

(Endorsed:) 1599. I. J. Lewis vs. H. Lewis et al. Copy amendment to petition for intervention. Filed Jan'y 28, 1881. T. J. Edwards, clerk U. S. cir. court, dist. Nevada.

In the district court of the 5th judicial district, State of Nevada, in & for Lander County.

ISAAC J. LEWIS
v.
HARRIS LEWIS, ABRAHAM COLMAN, J. A. Wright, Isaac Hoffman & Ch. Hoffman, comprising the firm of Hoffman Bro's, Joseph Huber, Charles Sadler, A. & M. Sower, R. Hogan, J. D. Pringle, Charles Poulkinghorn, B. C. Thomas, & James Brannen.

Upon reading & filing the bill of complaint herein, & on motion of
28 Delos Lake, esq., of counsel for plt'ff, ordered that J. P. Joachimsen, esq., be & he hereby is appointed receiver, with the usual powers of receiver, & that he take possession of all stock & effects of said firm of H. Lewis & Co., situate in the township of Austin, & now in charge of defendants, B. C. Thomas, J. D. Pringle, & James Brannen, and all the stock & effects of said firm, & proceed to collect all property & merchandise, or the value thereof, carried away & appropriated to their own use by any person or persons or defendants herein, & that said J. D. Pringle, B. C. Thomas, & James Brannen turn over said property to said receiver upon receiver filing a bond in $25,000\frac{00}{100}$ as a penal sum.

And it is further ordered that in the mean time & until the further order of this court, let all proceedings on the part of defendant Harris Lewis be stayed.

(Signed) D. C. McKENNEY,
District Judge.

STATE OF NEVADA,
Lander County, ss:

J. A. Miller, county clerk, & ex officio clerk of above court, do hereby certify that a bond in due form of law & approved as to sufficiency has been filed herein as required by law.

29 J. A. MILLER, *Clerk.*

Dated January 17, 1881.

Clerk's office of the district court of the fifth judicial district in and for the county of Lander, ss:

I, the undersigned, clerk of said court, do hereby certify the foregoing to be a true and correct copy of the order appointing receiver in the above-entitled cause, now on file in my office.

Attest my hand and seal of said court this 18th day of January, A. D. 1881.

[L. S.] J. A. MILLER, *Clerk.*

(Endorsed:) 5th district court. I. J. Lewis vs. H. Lewis & al. Certified copy order. Filed Jan'y 20, 1881. T. J. Edwards, clerk U. S. cir. court, dist. Nevada.

30 Know all men by these presents, that we, Joseph P. Joachimsen, of the city and county of San Francisco, as principal, and A. Nicholls and Allen A. Curtis, of the city of Austin, in the county of Lander and State of Nevada, as sureties, are jointly and severally held, bound, and indebted unto the State of Nevada in the just and full sum of twenty-five thousand dollars gold coin of the United States, for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals. Dated this fifteenth day of January, A. D. 1881.

Whereas by an order of the district court of the fifth judicial district of the State of Nevada, in and for the county of Lander, made on the 15th day of January, 1881, in the case then pending in said court, wherein I. J. Lewis was plaintiff and Harris Lewis and others are defendants, the above-bounden Joseph P. Joachimsen was duly appointed receiver of all the assets and property, real, personal, and mixed, debts, and choses in action belonging to the partnership of Lewis and Company, in the State of Nevada, on the 30th day of November, 1880. Now, the condition of this obligation is such that if the bounden Joseph P. Joachimsen shall and

31 will well, truly, and faithfully execute and perform the duties of such receiver according to the law, then this obligation to be void, otherwise to remain in full force and virtue.

JOSEPH JOACHIMSEN. [SEAL.]
A. NICHOLLS. [SEAL.]
ALLEN A. CURTIS. [SEAL.]

STATE OF NEVADA,
County of Lander, ss:

A. Nicholls and Allen A. Curtis, being severally duly sworn, say each for himself, and not one for the other, that he is worth the amount speci-

fied in the within instrument on which he is surety, over and above all his debts and liabilities, exclus'e of property exempt by law from execution, and that he is a resident and householder within the State of Nevada.

A. NICHOLLS.
ALLEN A. CURTIS.

Subscribed and sworn to before me this 17th day of January, A. D. 1881.

J. A. MILLER, *Clerk.*

32 STATE OF NEVADA,
County of Lander, ss:

I, Joseph P. Joachimsen, do solemnly swear that I will support, protect, and defend the Constitution and Government of the United States, and the constitution and government of the State of Nevada, against all enemies, whether domestic or foreign, and that I will bear true faith, allegiance, and loyalty to the same, any ordinance, resolution, or law of any State, convention, or legislature, to the contrary notwithstanding; and, further, that I do this with a full determination, pledge, and purpose, without any mental reservation or evasion whatsoever. And I do further solemnly swear that I have not fought a duel, or sent or accepted a challenge to fight a duel, nor been a second to either party, nor in any manner aided or assisted in such duel, nor been knowingly the bearer of such challenge or acceptance, since the adoption of the constitution of the State of Nevada; and that I will not be so engaged or concerned, directly or indirectly, in or about any such duel during my continuance in office. And, further, that I will well and faithfully perform all the duties of the office of receiver of the partnership property of the firm of H. Lewis & Co., as set forth in an order made January 15, 1881, on which I am about to enter, so help me God.

JOSEPH P. JOACHIMSEN.

Subscribed and sworn to before me this 17th day of January, A. D. 1881.

J. A. MILLER, *Clerk.*

33 Clerk's office of the district court of the fifth judicial district in and for the county of Lander, ss:

I, the undersigned, clerk of said court, do hereby certify the foregoing to be a true and correct copy of bond of receiver in the above-entitled cause, now on file in my office.

Attest my hand and seal of said court this 18th day of January, A. D. 1881.

[L. S.] J. A. MILLER, *Clerk.*

(Endorsed:) 1599. 5th district court. I. J. Lewis vs. H. Lewis et al. Bond of receiver.

The within bond is hereby approved as to form sufficiency of sureties.

Dated Jan'y 17, 1881.

D. C. McKENNEY,
District Judge.

Filed January 17, 1881. J. A. Miller, clerk. Filed Jan'y 20, 1881. T. J. Edwards, clerk U. S. cir. court, dist. Nevada.

34 In the district court of the 5th judicial district in and for the county of Lander, State of Nevada.

I. J. LEWIS
v.
HARRIS LEWIS ET ALS.

I. J. Lewis, plaintiff above named, and his attorney:

Please take notice that on the 24th day of January, A. D. 1881, at 10 o'clock a. m. of that day, at the court-room of said court, at Austin, Lander County, Nevada, upon the answer of the defendants and the petition of the intervenors, Herman Shainwald and Ralph L. Shainwald, and upon such other evidence as may be adduced, the said defendants and intervenors will move said court for an order vacating the appointment of a receiver in this action, and to set aside the injunction order in this action.

January 17th, 1881.

H. T. CRESWELL,
Att'y for Def'ts and Intervenors.

Clerk's office of the district court of the fifth judicial district in and for the county of Lander, ss:

I, the undersigned, clerk of said court, do hereby certify the fore-
35 going to be a true and correct copy of motion to set aside appointment of receiver and vacate injunction in the above-entitled cause, now on file in my office.

Attest my hand and seal of said court this 18th day of January, A. D. 1881.

[L. S.] J. A. MILLER, *Clerk.*

(Endorsed:) I. J. Lewis vs. H. Lewis et als. Notice of motion. Filed January 17, 1881. J. A. Miller, clerk. Filed Jan'y 20, 1881. T. J. Edwards, clerk U. S. cir. court, dist. Nevada.

In the district court of the 5th judicial district of the State of Nevada, in and for the county of Lander.

TUESDAY, *January 18th*, 1881.

Court met pursuant to adjournment.

Present, Hon. D. C. McKenney, district judge, J. A. Miller, clerk.

I. J. LEWIS
v.
H. LEWIS ET ALS.

Moved by H. T. Creswell, attorney for petitioners, that Herman Shainwald and Ralph L. Shainwald be made defendants in the above-entitled cause upon their petition for intervention.

Moved by H. T. Cresswell, attorney for defendants, that an
36 order be made vacating the appointment of the receiver in the above action, and to vacate the injunction order made therein. Said motion based upon the answer of defendants and the petition of intervention of Ralph L. Shainwald and Herman Shainwald.

Moved by H. T. Cresswell, attorney for defendants and petitioners in intervention, that upon the petition for removal of said suit to the United States circuit court for the district of Nevada, the bond for removal having been approved therein, that an order be made transferring said suit to said court.

Clerk's office of the district court of the fifth judicial district in and for the county of Lander, ss:

I, the undersigned, clerk of said court, do hereby certify the foregoing to be a true and correct copy of the record of the minutes of said cause in the above-entitled action.

Attest my hand and seal of said court this 18th day of January, A. D. 1881.

[L. S.] J. A. MILLER, *Clerk.*

(Endorsed:) I. J. Lewis vs. H. Lewis et als. Certified copy of minutes. Filed Jan'y 20, 1881. T. J. Edwards, clerk U. S. cir. court, dist. Nevada

37 In the district court of the fifth judicial district of the State of Nevada, in & for the county of Lander.

I. J. LEWIS, PL'FF,
v.
H. LEWIS ET AL., DEF'TS.

STATE OF NEVADA,
County of Lander, ss:

John Bicknell, being duly sworn, doth depose and say that he is & was over the age of 21 years at the time hereinafter named, and that he is a white male citizen of the United States, and is not a party to this action, and is not interested therein, but is competent to be a witness upon the trial of this cause. That by an order of this court duly made herein on the 15th day of January, 1881, deponent was duly appointed elisor in the above-entitled action, as will more fully appear by said order. That at the city of Austin, county of Lander, State of Nevada, on the 17th day of January, 1881, deponent, as such elisor, personally served certified copies of the order appointing a receiver herein, together with the certificate of the clerk of this court; that said receiver had duly filed his bond as required by said order, upon the defendants, B. C. Thomas, J. D. Pringle, & J. Brannan, by delivering to each of said defendants
38 personally a certified copy of the order appointing said receiver, together with said certificate attached, and leaving the same with each of said defendants personally.

JOHN BICKNELL.

Subscribed & sworn to before me this 17th day of January, 1881.

[SEAL.] J. A. MILLER, *Clerk.*

In the district court of the fifth judicial district of the State of Nevada, in & for the county of Lander.

I. J. LEWIS, PL'FF,
v.
H. LEWIS ET AL., DEF'TS.

STATE OF NEVADA,
County of Lander, ss:

Joseph P. Joachimsen, being duly sworn, doth depose and say that by an order duly made by this court on the 15th day of January, 1881, and duly entered and filed, deponent was appointed receiver of all the property and effects of the firm of H. Lewis & Co., situate in the township of Austin, county of Lander, State of Nevada, and that on the 17th day of January, 1881, deponent duly qualified as such receiver, and duly filed his bond as such receiver in the sum of twenty-five thousand
39 dollars, which said bond was duly approved as to form and sufficiency of sureties, and that deponent thereupon entered upon the duties of such receivership. That a certified copy of said order appointing a receiver, together with the certificate of the clerk of this court that deponent had filed the bond required by said order, was duly served upon defendants, B. C. Thomas, J. D. Pringle, & J. Brannan, in possession of the partnership property aforesaid, and that deponent, as such receiver, duly demanded of said B. C. Thomas, J. D. Pringle, & J. Brannan, & each of them, that they surrender and deliver to deponent, as such receiver, the partnership property of said firm of H. Lewis & Co., situate as aforesaid, but that said B. C. Thomas, J. D. Pringle, & J. Brannan, & each of them, refuse to deliver said property, or any part thereof, to this deponent as such receiver, as in said order required.

JOSEPH P. JOACHIMSEN.

Subscribed and sworn to before me this 17th day of January, 1881.
[SEAL.] J. A. MILLER, *Clerk.*

40 In the district court of the 5th judicial district, State of Nevada, in & for the county of Lander.

I. J. LEWIS
v.
H. LEWIS & AL.

Upon the annexed affidavit of John Bicknell, elisor appointed herein, & affidavit of J. P. Joachimsen served upon them & each of them, & of the certified copy of the order made herein, appointing J. P. Joachimsen, esq., a receiver herein of the partnership property of the firm of H. Lewis & Co., & upon all the papers on file herein, let the defendants, B. C. Thomas, J. D. Pringle, & J. Brannen, & each & every of them, show cause before me, the judge of above court, at the court in the court-room in the city of Austin, on the 18th day of January, 1881, at 9 o'clock a. m., why an order should not be made requiring the said J. D. Pringle, B. C. Thomas, & J. Brannen forthwith to deliver to Joseph P. Joachimsen, the receiver herein, all the partnership property belonging to the firm of H.

Lewis & Co., situate in the township of Austin, county of Lander, & State of Nevada, & located in store known as granite store, and why they and each & every of them should not be punished as for a contempt for
41 disobeying the order of this court in refusing to deliver over said property as required in said order; and in the mean time & until the hearing & disposition of this motion, let all proceedings on the part of said J. D. Pringle, B. C. Thomas, & J. Brannen, & each & every of them, be, and they are hereby, stayed, so far as the same relates to the removal or disposition of the said property or any part thereof. And it is further ordered, good cause appearing therefor, that the return day of within order be shortened, and the same hereby is shortened to the time set forth in within order.

Dated January 17, 1881.

D. C. McKENNEY,
District Judge.

Clerk's office of the district court of the fifth judicial district in and for the county of Lander, ss:

I, the undersigned, clerk of said court, do hereby certify the foregoing to be a true and correct copy of order to show cause in the above-entitled cause now on file in my office.

Attest my hand and seal of said court this 18th day of January, A. D. 1881.

[SEAL.] J. A. MILLER, *Clerk.*

(Endorsed:) 1599. 5th judicial dist. court. I. J. Lewis vs. H. Lewis. Copy order to show cause. Filed Jan'y 20, 1881. T. J. Edwards, clerk U. S. cir. court, dist. Nevada.

42 In the district court of the 5th judicial district of the State of Nevada in and for the county of Lander.

JANUARY 25TH, 1881.

Present Hon. D. C. McKenney, district judge.

I. J. LEWIS, PL'FF,
v.
H. LEWIS ET AL., DEF'TS.

A motion having been upon the complaint and answer herein, and the testimony of I. J. Lewis, F. McMasters, S. E. Keenan to vacate and set aside the order heretofore made herein appointing a receiver of the partnership property and effects of H. Lewis & Co., and said motion coming on to be heard, and after hearing H. T. Creswell, esq., of counsel in support of said motion, and C. J. Lansing, esq., of counsel in opposition thereto, and due deliberation being had thereon, on motion of C. J. Lansing, esq., of counsel for pl'ff, it is ordered that the said motion to vacate and set aside the order appointing a receiver herein be and the same hereby is denied, and it is further ordered that the order heretofore made herein appointing J. P. Joachimsen receiver of the partnership property and

effects of the firm of H. Lewis & Co. be and the same hereby is continued in force until the final determination of this action and the further order of this court.

43 To which decision and ruling defendant excepts.

D. C. McKENNEY,
District Judge.

Clerk's office of the district court of the fifth judicial district in and for the county of Lander, ss:

I, the undersigned, clerk of said court, do hereby certify the foregoing to be a true and correct copy of order denying motion to vacate appointment of receiver in the above case now on file in my office.

Attest my hand and seal of said court this 26th day of January, A. D. 1881.

[L. S.] J. A. MILLER, *Clerk.*

(Endorsed:) 1599. I. J. Lewis vs. H. Lewis et als. Copy order denying motion to vacate app't receiver. Filed Jan'y 28, 1881. T. J. Edwards, clerk U. S. cir. court, dist. Nevada.

44 In the district court of the fifth judicial district of the State of Nevada in and for the county of Lander.

JANUARY 25*th*, 1881.

Present Hon. D. C. McKenney, judge.

I. J. LEWIS, PL'FF,
v.
H. LEWIS ET ALS., DEF'TS.

A motion having been made to compel the defendant, J. D. Pringle, B. C. Thomas, and J. Brennan to deliver over to the receiver herein the partnership property of the firm of H. Lewis & Co., situate in the township of Austin, county of Lander and State of Nevada, and to punish said defendants J. D. Pringle, B. C. Thomas, and J. Brennan for a contempt in disobeying the order of this court in refusing to turn over to the receiver the partnership property aforesaid, and said motion coming on to be heard, and after hearing C. J. Lansing, esq., and Jos. P. Joachimsen, counsel, in support of said motion, and H. T. Creswell, esq., of counsel, in opposition thereto, and due deliberation being had thereon, it is ordered that said motion be and the same hereby is granted, and the said defendants J. D. Pringle and B. C. Thomas, and each of them, are hereby adjudged guilty of a contempt of this court in disobeying the order of this court in refusing to turn over the aforementioned partnership
45 property to the receiver herein. And it is further ordered that for the contempt aforesaid, the said defendants J. D. Pringle, and B. C. Thomas are, and each of them hereby is, fined the sum of one dollar.

To which decision and ruling of court def't excepts.

D. C. McKENNEY,
District Judge.

Clerk's office of the district court of the fifth judicial district, in and for the county of Lander, ss:

I, the undersigned, clerk of said court, do hereby certify the foregoing to be a true and correct copy of order punishing parties for contempt in the above-entitled cause, now on file in my office.

Attest my hand and seal of said court this 26th day of January, A. D. 1881.

[SEAL.] J. A. MILLER, *Clerk.*

(Endorsed:) 1599. I. J. Lewis vs. H. Lewis et als. Copy order punishing parties for contempt. Filed Jan'y 28, 1881. T. J. Edwards, clerk U. S. cir. court, dist. Nevada.

46 In the district court of the 5th judicial district, in and for the county of Lander, State of Nevada.

I. J. LEWIS, PLAINTIFF,
v.
HARRIS LEWIS ET ALS. AND RALPH L. SHAINWALD, intervenor.

On reading and filing the petition of Ralph L. Shainwald and Herman Shainwald, dated the 17th day of January, A. D. 1881, and proof of due service of notice of this motion, and on motion of H. T. Creswell, for said petitioners, and after hearing C. J. Lansing in opposition, it is ordered that Ralph L. Shainwald be made a party defendant in said action, and that the summons and complaint be amended accordingly, and that said Ralph L. Shainwald cause notice of appearance for himself herein to be given to pl'ff's attorney within five day' from the entry of this order, and a copy of the complaint as amended served upon his attorney, and that the cause thereupon proceed as if said Ralph L. Shainwald had been originally a party defendant thereto.

D. C. McKENNEY,
District Judge.

47 In the district court of the 5th judicial district, in and for the county of Lander, State of Nevada.

I. J. LEWIS
v.
H. LEWIS ET ALS. AND RALPH L. SHAINWALD, intervenor.

It is hereby expressly stipulated by and between C. J. Lansing, att'y for plaintiff, and H. T. Creswell, att'y for defendants, in the above-entitled suit, that the service of a notice of appearance of the above-named intervenor is hereby accepted, and that the service of all amended pleadings and summons necessary to be made in consequence of said intervention are hereby expressly waived, and the papers in said suit are to be treated

hereafter as if service had been made, and any amendments thereto are hereby expressly waived.

C. J. LANSING,
Att'y for Pl'ff.
H. T. CRESWELL,
Att'y for Defendants and Intervenor.

Clerk's office of the district court of the fifth judicial district, in and for the county of Lander, ss:

48 I, the undersigned, clerk of said court, do hereby certify the foregoing to be a true and correct copy of order allowing intervention and stipulation, now on file in my office, in the above-entitled cause. Attest my hand and seal of said court this 26th day of January, A. D. 1881.

[SEAL.] J. A. MILLER, *Clerk.*

(Endorsed:) 1599. I. J. Lewis vs. H. Lewis et als. Certified copy order allowing intervention, &c. Filed Jan'y 28, 1881. T. J. Edwards, clerk, U. S. cir. court, dist. Nevada.

49 In the district court of the 5th judicial district in and for the county of Lander, and State of Nevada.

ISAAC J. LEWIS
v.
HARRIS LEWIS, ABRAHAM COLMAN, J. A. Wright, Isaac Hoffman and C. Hoffman, comprising the firm of Hoffman Bros., Joseph Huber, Charles Sadler, A. and M. Sower, R. Hogan, J. D. Pringle and Charles Polkinhorn, B. C. Thomas, & James Brennan.

To the honorable district court of 5th judicial district in and for the county of Lander, State of Nevada:

Your petitioners, Herman Shainwald and R. L. Shainwald, and all of the above-named defendants, respectfully show that they are intervenors and defendants in the above-entitled action, that said action was commenced on the 17th day of January, A. D. 1881, by the above-named plaintiff, for the purpose of obtaining a judgment in this court against said defendant and the defendants therein named for dissolution of a partnership alleged to have existed between I. J. Lewis and Harris Lewis, above named, and that the accounts of said alleged copartnership be taken and stated both between said firm and all creditors, and between
50 the individual members of said firm and the private creditors of each, and also as between said copartners, and that a receiver be appointed, and that he take possession of all the stock and effects of said firm, and proceed to collect all property and merchandise, or the value thereof, carried away and appropriated to their (the defendant's) own use by any persons, or in default thereof that an account be stated between said copartnership and said persons receiving said goods, wherein they be charged the value thereof, and also to collect all debts due to said firm.

That said stock and merchandise on hand be sold, and said property so carried away and appropriated, when recovered, be sold, or that the accounts due from any person by reason of taking and appropriating the same be collected. That the proceeds be applied in payment of the debts of said copartnership. That the surplus due plaintiff be paid to him, and the surplus due Harris Lewis be paid to his individual creditors as the court shall order. That J. D. Pringle, B. C. Thomas and James Brennan, defendants above-named, in charge of said goods, be restrained from selling or disposing of the same, and that they turn them over to said receiver.

That the amount involved in said suit is more than the sum of ten thousand dollars. And your petitioner shows that the in
51 dispute in this suit exceeds the sum of five hundred dollars exclusive of costs, and that the controversy herein is between citizens of the State of Nevada and a citizen of the State of California. That the real parties in interest in this action are I. J. Lewis, of the county of Lander, State of Nevada, as plaintiff, and Ralph L. Shainwald, receiver in the matter of Herman Shainwald, assignee in bankruptcy, of the firm of Schoenfield, Cohen & Co., and of Lewis S. Schoenfeld, Isaac Newman, and Simon Cohen vs. H. Lewis, and Herman Shainwald, as assignee for said bankrupts. That on the 16th day of Nov., 1880, and before the commencement of this action, the said Ralph L. Shainwald was duly appointed receiver against Harris Lewis in the above-mentioned case by the Hon. Ogden Hoffman, judge of the U. S. district court for the district of California. Ex. C, hereto attached, is a copy of said appointment and made part of this petition. That on the 5th day of Nov., 1880, and before the commencement of this suit, the said Herman Shainwald, assignee, &c., as aforesaid, obtained judgment against said H. Lewis for a large amount of money, to wit, about the sum of $98,000 in the said dist. court of the United States. That on the day of Nov., 1880, and before the commencement of this action, the said
52 Harris Lewis, in obedience to an order duly made by the said Ogden Hoffman, dis. judge as aforesaid, made and executed an assignment to said Ralph L. Shainwald, receiver as aforesaid, by which he, the said Harris Lewis conveyed, assigned, transferred, and delivered unto the said Ralph L. Shainwold, his successor, successors, and assigns, all and every and all manner of estate and property, real and personal, things in this action, debts, equitable interests, and other effects, and all bills, notes, contracts, books of account and other evidences retaining thereto of the said Harris Lewis. Ex. E, hereto attached, is a copy of said assignment and is made a part of this petition. That said Ralph L. Shainwald has never been removed as said receiver by said dist. court. That defendant J. D. Pringle is the duly authorized and appointed agent of said Ralph L. Shainwald, receiver as aforesaid, and as such has possession of the goods, wares, and effects mentioned in plaintiffs complaint on file herein.

That at the time of the commencement of the above-entitled suit the said I. J. Lewis was, and now is, a resident of the State of Nevada.

That at the time of the commencement of this action the said Ralph L. Shainwald and Herman Shainwald were, and now are, residents and citizens of California.

53 That the matter in controversy in said suit can be wholly settled and determined between the parties thereto in the circuit court of the United States in and for the district of Nevada.

for plaintiff, it is ordered that Ralph L. Shainwald, of the city and
58 county of San Francisco, State of California, be, and he is hereby, appointed receiver of the estate and property, real and personal, things in action, debts, equitable interests, and other effects of the said respondent Harris Lewis, and which belonged to, or were held in trust for, him, at the time of commencing this suit, or in which he had any beneficial interest, except such property as is by law exempt from execution; also of all the rents, issues, incomes, and profits of the real estate and property of said respondent, with the usual powers and duties of a receiver, upon the said receiver executing, acknowledging, and filing with the clerk of this court a bond in the usual form to the United States of America in the penalty of thirty thousand dollars, with two sufficient sureties, freeholders or householders, to be approved by the judge of this court.

And it is further ordered that the said respondent Harris Lewis do assign, transfer, and deliver to said receiver, on oath, under the direction of Southard Hoffman, esq., herein appointed referee for the special reason that he has heretofore acted as master in the suit in which the decree mentioned in plaintiff's bill in this suit was obtained by consent of all the parties to said suit, that he has taken a great portion of the testimony in said suit, is familiar with the facts in said suit, and has taken the
59 testimony of the respondent herein in said suit, and that no objection to his appointment on the part of any of the parties herein is known or supposed to exist, all such property, real and personal, things in action, equitable interests, and other effects, except as aforesaid property exempt by law from execution, and trust property where the trust has been created by or trust fund proceeded from some other person than said respondent, and that he, the said respondent, deliver to said receiver, in like manner, all bills, notes, contracts, books of account, and other evidences relating thereto, and the said respondent execute and deliver to said receiver, under the direction of said referee, a general assignment of such property and effects, and also execute, acknowledge, and deliver to said receiver, under the direction of said referee, a conveyance and assignment of the real estate aforesaid, and of the rents, issues, and profits thereof; and that said respondent Harris Lewis and his tenants allow to the said receiver and pay to him the rents and profits of any real estate of which the said respondent is entitled to receive the rents and profits, and that the said receiver have power to make leases of such real estate from time to time, not exceeding one year, as he may deem advisable, and the said respondent ap-
60 pear before said referee, as he shall be summoned or required to do from time to time, and produce such books, papers, and accounts, and submit to such examination as said referee shall direct in relation to any matter which he may lawfully required to disclose.

OGDEN HOFFMAN, *Dist. Judge.*

NOVEMBER 16, 1880.

(Endorsed:) Filed November 16, A. D. 1880. Southard Hoffman, clerk, by A. D. Grimwood, deputy clerk.

EX. E.

This indenture, made and entered into this sixteenth day of November, in the year of our Lord one thousand eight hundred and eighty, by and

between Harris Lewis, of the city and county of San Francisco, State of California, the party of the first part, and Ralph L. Shainwald, of the same place, receiver of the estate and effects of the said party of the first part, hereinafter referred to, appointed by the district court of the United States in and for the district of California, the party of the second part, witnesseth:

That whereas, in and by an order of the said court made and filed on or about the 16th day of November, 1880, in a certain action
61 or cause wherein Herman Shainwald, as assignee in bankruptcy, of the firm of Schoenfeld, Cohen & Co., and of Louis L. Schoenfeld, Isaac Newman, and Simon Cohen, bankrupts, was complainant, and the said Harris Lewis, the party of the first part, was respondent, which said action or cause then was and now is pending in said court, and is numbered two hundred and thirty-one (231) in said court, it was ordered that said Ralph L. Shainwald, the party of the second part, be, and he was by said order, appointed receiver of the estate and property, real and personal, things in action, debts, and equitable interests, and other effects of the said Harris Lewis, the party of the first part, and which belonged to or were held in trust for him, said Harris Lewis, the party of the first part, at the time of the commencement of said action or cause, or in which he, said Harris Lewis, the party of the first part, had any beneficial interest, except such property as is by law exempt from execution, also of all the rents, issues, incomes, and profits of all the real estate and property of said Harris Lewis, the party of the first part, with the usual powers and duties of a receiver, upon the said party of the second part's executing, ac-
62 knowledging, and filing with the clerk of said court a bond in the usual form, to the United States of America, in the penalty of thirty thousand dollars, with two sufficient sureties, freeholders or householders, to be appovoed by the judge of said court.

And whereas in and by said order, it is further ordered that said Harris Lewis, the party of the first part, do assign, transfer, and deliver to said party of the second part, on oath, under the direction of Southard Hoffman, esq., therein in said order appointed referee in said action or cause, all such property, real and personal, things in action, equitable interests, and other effects, except as aforesaid property exempt by law from execution and trust property, where the trust has been created by, or trust fund proceeded from, some person other than said party of the first part, and that said party of the first part deliver to said party of the second part in like manner all bills, notes, contracts, books of account, and other evidences relating thereto; and that said party of the first part execute and deliver to said party of the second part, as such receiver, under the direction of said referee, a general assignment of such property, and effects, and also execute, acknowledge, and deliver to said party of the second part, as such receiver, under the direction of said referee, a
63 conveyance and assignment of the real estate aforesaid, and of the rents, issues, and profits thereof; and that said party of the first part, and his tenants attorn to the said party of the second part as such receiver, and pay to him the rents and profits of any real estate of which the said party of the first part is entitled to receive the rents and profits, and that the said party of the second part, as such receiver, have power

to make leases of such real estate from time to time, not exceeding one year, as he may deem advisable.

And whereas the said order is now in full force and effect, and whereas the said party of the second part has, since the making and filing of said order, executed and acknowledged and filed with the clerk of said court a bond in the usual form, to the United States of America, in the penalty of thirty thousand dollars, with two sufficient sureties, householders, which bond is conditional for the faithful performance of his duties as such receiver, by the party of the second part, and has been approved by the judge of said court; and whereas the said party of the second part has entered upon the discharge of his duties as, and is now, such receiver.

Now, therefore, in consideration of the premises, and of the said
64 order, and in obedience to the said order, and in obedience to law, the said party of the first part hath conveyed, assigned, transferred, and delivered over, and by these presents doth convey, assign, transfer, and deliver unto said party of the second part, his successor, successors, and assigns, under the direction of said referee testified by his approval endorsed hereon, all and every, and all manner of estate and property, real and personal, things in action, debts, equitable interests, and other effects, and all bills, notes, contracts, books of account, and other evidences relating thereto, of the said party of the first part, and which belong to or were held in trust for said party of the first part or in which said party of the first part had any beneficial interest at the time of the commencement of said action or cause, except such property as is by law exempt from execution, and trust property where the trust has been created by or trust fund proceeded from some person other than said party of the first part; also all the rents, issues incomes, and profits of all the real estate and property of said party of the first part. To have and to hold the same unto the said party of the second part, as such receiver as aforesaid, and to his successors and assigns, subject to the present and
65 future order, direction, and control of said court. And for better and more effectually enabling the said party of the second part, his successors and assigns, to recever and receive all or any part of the aforesaid property and estate, things in action, debts, equitable interests, and other effects hereby conveyed, assigned, and transferred, the said Harris Lewis, party of the first part, has made and appointed, and by these presents does make and appoint, the said Ralph L. Shainwald, party of the second part, his successors and assigns, the attorney and attorneys for him, said party of the first part, in his name, to commence, continue, discontinue, and again bring, perfect, and carry out actions and suits against any corporated company, firm, persons, or person, for or on account of all or any part of said property and estate and other effects.

In witness whereof the party of the first part has hereunto set his hand and seal the day and year first above written.

H. LEWIS. [L. S.]

Signed, sealed, and delivered in the presence of—

DELOS LAKE.

D. W. C. STORY.

Harris Lewis is hereby directed to execute the foregoing assignment.

SOUTHARD HOFFMAN,
Referee.

DEC. 1ST, 1880.

The form of the within is approved.

66 OGDEN HOFFMAN,
Dist. Judge.

UNITED STATES OF AMERICA,
District of California, ss:

On this twentieth day of December, A. D. one thousand eight hundred and eighty, before me, Southard Hoffman, clerk of the district court of the United States for the district of California, duly commissioned and sworn, personally appeared the within-named Harris Lewis, whose name is subscribed to the annexed instrument as party thereto, personally known to me to be the individual described in, and who executed, the said annexed instrument, and the said Harris Lewis acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed the seal of the said district court the day and year in this certificate first above written.

SOUTHARD HOFFMAN,
Clerk of the District Court of the United States for the District of California.

(In pencil:) No seal indicated.

67 EX. F.

In the district court of the United States for the district of California.

HERMAN SHAINWALD, AS ASSIGNEE IN BANKRUPTCY of the firm of Schoenfeld, Cohen & Co., and of Louis F. Schoenfeld, Isaac Newman, and Simon Cohen, bankrupts, complainant, v. HARRIS LEWIS, ABRAHAM COLMAN, AND B. C. Thomas, respondents.	In equity. No. 232.

DISTRICT OF CALIFORNIA, *ss:*

Upon reading and filing the verified bill of complaint herein, and good cause appearing therefor, it is ordered that Harris Lewis, Abraham Colman, and B. C. Thomas do appear before this court, at the court-room thereof, in the city and county of San Francisco, on Thursday, the 16th day of December, A. D. 1880, at 11 o'clock a. m. of that day, then and there to show cause, if any there be, why Harris Lewis, Abraham Colman, and B. C. Thomas, and each of them, and their, and each of their, agents, attorneys, servants, and employés, and each and every of them, and each and all person and persons whatsoever acting by, for, through, or on behalf of said respondents, or either or any of them, from levying

upon, seizing, or taking possession of, or selling, or otherwise interfering with or disturbing, by or under or by virtue of any execution or writ of execution heretofore issued, or which hereafter may be issued, out of the district court of the fifth judicial district of the State of Nevada in and for the county of Lander, or out of any other court or tribunal, or by or under or by virtue of any other process out of or from said court, or any other court or tribunal, the goods, wares, merchandise, or other personal property, contained in that certain store or building in the city of Austin, county of Lander, State of Nevada, where the respondent Harris Lewis recently carried on business, and which said store or building is now in possession of one Ralph L. Shainwald, as receiver, &c., or of his agent, or any accounts or debts due or to become due to said Harris Lewis for any goods, wares, or merchandise sold at said store, and also from in any manner interfering with or taking possession, or disposing of, or attempting to interfere with, take possession, or dispose of, all or any part of said goods, wares, merchandise, accounts, or debts.

And it is further ordered that in the mean time and until the further or other order of this court, the said Harris Lewis, Abraham Colman, and B. C. Thomas, and each and all of them, and their and each of their agents, attorneys, servants, and employés, and each and, every of them, and every, each, and all person and persons whatsoever acting by, for, through or on behalf of said respondents, or either or any of them, be and they are hereby enjoined and restrained from levying upon, seizing or taking, possession of, or selling, or otherwise interfering with or disturbing, by, or under, or by virtue of any execution or writ of execution heretofore issued or may hereafter be issued out of the district court of the fifth judicial district of the State of Nevada, in and for the county of Lander, or out of any other court or tribunal, or by or under or by virtue of any process out of or from said court or any other court or tribunal, the goods, wares, merchandise, or other personal property contained in that store or building in the city of Austin, county of Lander, State of Nevada, where the respondent, Harris Lewis, recently carried on business, and which said store or building is now in possession of one Ralph L. Shainwald, as receiver, &c., or his agent, or any accounts or debts due or to become due to said Harris Lewis, for any goods, wares, merchandise sold at said store, and also from in any manner interfering with or taking possession or disposing of or attempting to interfere with, take possession, or dispose of all or any or any part of said goods, wares, merchandise, accounts, or debts.

Witness the honorable Ogden Hoffman, judge of the said district court, and the seal thereof, at San Francisco, in said district, on the eleventh day of December, A. D. 1880.

[SEAL.] SOUTHARD HOFFMAN,
Clerk of said District Court,
By A. D. GRIMWOOD,
Deputy Clerk.

I, Southard Hoffman, clerk of the district court of the United States, for the district of California, do hereby certify the foregoing to be a full, true, and correct copy of the order to show cause, and temporary restraining order issued in the cause entitled Herman Shainwald, as assignee, &c.,

vs. Harris Lewis, Abraham Colman, and B. C. Thomas, in said court, No. 232 in equity.

Attest my hand and the seal of said court this 14th day of December, A. D. 1880.

[SEAL.] SOUTHARD HOFFMAN, *Clerk*,
By A. D. GRIMWOOD,
Deputy Clerk.

71 Clerk's office of the district court of the fifth judicial district in and for the county of Lander, ss:

I, the undersigned, clerk of said court, do hereby certify the foregoing to be a true and correct copy of petition for removal to U. S. circuit court, in the above-entitled cause, now on file in my office.

Attest my hand and seal of said court this 18th day of January, A. D. 1881.

[SEAL.] J. A. MILLER, *Clerk.*

(Endorsed:) Petition for removal. Filed Jan'y 20, 1881. T. J. Edwards, clerk, U. S. cir. court, dist. Nevada.

72 Know all men by these presents that we, W. F. Dyer, of Austin, Nevada, and Joseph Gilbert, of Austin, Nevada, are hereby held and firmly bound unto I. J. Lewis, the plaintiff in the case of I. J. Lewis, pl'ff, Harris Lewis, Abraham Colman, J. A. Wright, Isaac Hoffman and C. Hoffman, comprising the firm of Hoffman Bro's, Joseph Huber, Charles Sadler, A. and M. Sower, R. Hogan, J. D. Pringle, and Charles Polkinghorn, B. C. Thomas, and James Brannan, defendants, their executors, administrators, and assigns, in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said I. J. Lewis, his executors, administrators or assigns, for which payment, well and truly to be made, we, jointly and severally, bind ourselves, our heirs, executors, and every of them forever, by these presents. Sealed with our seals this 17th day of January, A. D. 1881.

Whereas the above-named I. J. Lewis has commenced an action in the 5th judicial district court in and for the county of Lander against Harris Lewis, Abraham Coleman, J. A. Wright, Isaac Hoffman and C. Hoffman, comprising the firm of Hoffman Bro's, Joseph Huber, Charles Sadler, A. and M. Sower, R. Hogan, J. D. Pringle, and Charles Polk-
73 inghorn, B. C. Thomas, and James Brannan; and whereas the said parties defendant have entered their appearance, and intervenors, Herman Shainwald, assignee, &c., and Ralph L. Shainwald, receiver, &c., have filed their petition for intervention, and have filed their petition for the removal of this cause into the circuit court of the United States in and for the district of Nevada:

Now, therefore, the condition of the above obligation is such that if the said defendants shall enter in said circuit court of the United States on the first day of its next session a copy of the record in said suit, and shall also then and there appear and enter special bail in said cause, if special bail was originally requisite therein *to* the law and practice of the United States and its courts, and shall well and truly pay all costs that may be awarded by said circuit court of the United States, if said court shall hold that said

suit wrongfully or improperly removed thereto, then these presents and obligations shall be void; otherwise to remain in full force and virtue.

In witness whereof the said obligors have hereunto set their hands and seals this 17th day of January, A. D. 1881.

W. F. DYER. [SEAL.]
JOSEPH GILBERT. [SEAL.]

74 STATE OF NEVADA,
County of Lander, ss:

W. F. Dyer and Joseph Gilbert, above named, being severally duly sworn, say each for himself that he is a resident of the State of Nevada and a householder and freeholder therein, and is worth double the sum specified in said undertaking over and above all his just debts and liabilities, and exclusive of property exempt from execution.

W. F. DYER.
JOSEPH GILBERT.

Subscribed and sworn to before me this 17th day of January, A. D. 1881.

J. A. MILLER, *Clerk.*

Approved Jan'y 18th, 1881.

D. C. McKENNEY,
Dist. Judge.

Clerk's office of the district court of the fifth judicial district in and for the county of Lander, ss:

I, the undersigned, clerk of said court, do hereby certify the foregoing to be a true and correct copy of bond for removal in the above-entitled cause now on file in my office.

Attest my hand and seal of said court this 18th day of Jan'y, A. D. 1881.

75 [SEAL.] J. A. MILLER, *Clerk.*

(Endorsed:) 1599. I. J. Lewis vs. Harris Lewis. Bond. Filed Jan'y 17, 1881. J. A. Miller, clerk. Filed Jan'y 20, 1881. T. J. Edwards, clerk U. S. cir. court, dist. Nevada.

In the district court of the 5th judicial district, in and for the county of Lander, State of Nevada.

I. J. LEWIS
v.
H. LEWIS ET AL. AND RALPH L. SHAINWALD, intervenor.

A petition having been filed by the defendants and intervenors in this cause at the time of entering their appearance herein, on the 17th day of January, A. D. 1881, praying for the removal thereof into the circuit court for the district of Nevada, pursuant to the statute of the United States in such case made and provided, and said petitioners having offered good and sufficient security pursuant to the directions of and as required

by the said statute; now, on motion of H. T. Cresswell, of counsel
76 for petitioners, and after hearing C. J. Lansing, of counsel for the plaintiff, in opposition thereto, it is declared that it is made to appear to the satisfaction of this court that the present suit is commenced in this court by a citizen of the State of Nevada against citizens of the State of California, and that the matter therein can be fully and wholly determined between them in said U. S. circuit court for the district of Nevada, and that the matter in dispute exceeds $500, exclusive of costs; and it is hereby further declared and ordered that this court accepts the surety offered by the petitioners, and that the said cause be removed for trial into the circuit court of the United States for the district of Nevada, pursuant to the said statutes, and that this court do proceed no further therein, and that all proceedings in this court in the said cause be, and the same are hereby, stayed.

Austin, Nevada, January 26th, 1881.

D. C. McKENNEY,
District Judge.

Clerk's office of the district court of the fifth judicial district, in and for the county of Lander, ss.

77 I, the undersigned clerk of said court, do hereby certify the foregoing to be a true and correct copy of order for removal of cause to U. S. circuit court in the above-entitled cause now on file in my office.

Attest my hand and seal of said court this 26th day of January, A. D. 1881.

[SEAL.] J. A. MILLER, *Clerk.*

(Endorsed:) I. J. Lewis vs. H. Lewis et als. Copy order for removal cause to U. S. circuit court. Filed Jan'y 28, 1881. T. J. Edwards, clerk U. S. cir. court, dist. Nevada.

78 United States circuit court, 9th judicial circuit and district of Nevada.

I. J. LEWIS
v.
HARRIS LEWIS ET ALS.

Now comes I. J. Lewis, the above-named plaintiff, by Delos Lake and C. N. Harris, his solicitors in the above-entitled cause, and moves this honorable court to remand the above-entitled cause to the district court, 5th judicial district, Lander County, and State of Nevada, on the following ground, to wit:

I. That the court has no jurisdiction of the parties nor of the subject-matter of this action, in this—

1st. That it appears upon the face of the complaint, answer, and petition for intervention, that when the said parties are properly classified in accordance with the interest of the respective parties in said action named, the subject-matter in dispute is not between citizens of different States as provided by section 2, laws of Congress of 1874 and '5, to wit, an act en-

(Endorsed:) U. S. circuit court for Nevada. I. J. Lewis vs. Harris Lewis et al. Affidavit of Harris Lewis. Filed Nov. 10, 1881. T. J. Edwards, clerk.

84 *Minutes U. S. circuit court, of date November* 10, 1881.

Hon. Lorenzo Sawyer, circuit judge.

* * * * * * *

ISAAC J. LEWIS
v.
H. LEWIS ET ALS.

Complainant's motion to remand this cause to the State court from whence it came was this submitted without oral argument. On motion, and by consent of the solicitors, each party was given fifteen days to file his brief.

* * * * * * *

Minutes of court, March 21, 1882.

Honorable Lorenzo Sawyer, judge.

* * * * * * *

ISAAC J. LEWIS
v.
HARRIS LEWIS ET ALS.

Complainant's motion to remand this cause to the State court, having been regularly submitted and duly considered, it is now ordered that said motion be granted, and the cause remanded to the State court from whence it came.

Thereupon, and on motion of solicitors for defendants and intervenors, it is hereby ordered that the papers in said cause be retained in this court for the period of ten days; that an appeal herein be allowed,
85 and that appellants execute and file an appeal bond in the sum of one thousand dollars.

* * * * * * *

In the circuit court of the United States of the ninth judicial circuit for the district of Nevada.

I. J. LEWIS, PLAINTIFF,
v.
HARRIS LEWIS ET AL., DEFENDANTS.

Removed from 5th district court, State of Nevada, for county of Lander.

On motion of James L. Crittenden, esq., of counsel for intervenors and for certain defendants, and good cause appearing to me therefor, it is hereby ordered that the order heretofore made in the above-entitled suit remand-

ing said suit to the State court, and all proceedings under said order and in said suit be, and the same are hereby, stayed for ten (10) days further time; and it is hereby further ordered that said intervenors and defendants, represented in said suit by said Crittenden and by H. T. Creswell, esq., be and they are hereby allowed ten (10) days further and additional time within which to give and file their bond on their appeal to the
86 Supreme Court of the United States from said order remanding said suit, and the time within which such bond may be given and filed is hereby extended for said further period of ten (10) days.

Dated March 30, 1882.

LORENZO SAWYER,
Circuit Judge.

(Endorsed:) U. S. circuit court, district of Nevada. I. J. Lewis vs. Harris Lewis et al. Order staying proceedings and extending time to file bond on appeal. Filed M'ch 31, 1882. T. J. Edwards, clerk.

In the circuit court of the United States of the 9th judicial circuit for the district of Nevada.

I. J. LEWIS, PLAINTIFF,
v.
HARRIS LEWIS ET AL., DEFENDANTS.

Removed from 5th district court, State of Nevada, for county of Lander

On motion of James L. Crittenden, esq., of counsel for intervenors and for certain defendants, and good cause appearing to me therefor, it is hereby ordered that the order heretofore made in the above-entitled suit remanding said suit to the State court, and all proceedings under said order and in said suit be, and the same hereby are, stayed for ten (10)
87 days further time; and it is hereby further ordered that said intervenors and defendants represented in said suit by said Crittenden and by H. T. Creswell, esq., be, and they are hereby, allowed ten (10) days further and additional time within which to give and file their bond on their appeal to the Supreme Court of the United States from said order remanding said suit, and the time within which such bond may be given and filed is hereby extended for said further period of ten (10) days.

Dated April 7, 1882.

LORENZO SAWYER,
Circuit Judge.

(Endorsed:) U. S. circuit court, dist. of Nevada. I. J. Lewis vs. Harris Lewis et al. Order extending time and staying proceedings. Filed April 8, 1882. T. J. Edwards, clerk.

88 *Bond on appeal to U. S. Supreme Court from U. S. circuit court for the district of Nevada.*

In the circuit court of the United States of the ninth judicial circuit for the district of Nevada.

I. J. LEWIS, PLAINTIFF,
v.
HARRIS LEWIS, ABRAHAM COLMAN, J. A. Wright, Isaac Hoffman and S. Hoffman, comprising the firm of Hoffman Bros.; Joseph Huber, Charles Sadler, M. and A. Sower, R. Hogan, J. D. Pringle, and Charles Polkinghorne, B. C. Thomas, and James Brennan, defendants; Ralph L. Shainwald, as receiver of the property, etc., of Harris Lewis, by appointment of the U. S. dist. court, dist. of California, and Herman Shainwald, as assignee in bankruptcy of Schoenfeld, Cohen & Co., etc., intervenors.

Removed from the district court of the fifth judicial district of the State of Nevada, in and for the county of Lander.

Know all men by these presents that we, James L. Smith and Jacob Dreyfuss, are held and firmly bound unto I. J. Lewis, the plaintiff above named, in the sum of one thousand dollars ($1,000.00), lawful money of the United States of America, to be paid to the said I. J. Lewis, for which payment well and truly to be made we, and each of us, bind ourselves respectively, and our respective heirs, executors, and administrators,
89 jointly and severally, firmly by these presents. Sealed with our seals, and dated the 10th day of April, A. D. 1882.

Whereas, by an order of the honorable circuit court of the United States of the ninth judicial circuit court for the district of Nevada, made the 21st day of March, 1882, in the above-entitled suit then pending in said court, the said above-entitled suit was and is remanded to the State court from which the said suit had theretofore been removed into said United States circuit court, to wit, the district court of the fifth judicial district of the State of Nevada, in and for the county of Lander, and whereas, Ralph L. Shainwald, as receiver, &c., Henry Shainwald, as assignee, &c., intervenors, and J. A Wright, Isaac Hoffman and S. Hoffman, Joseph Huber, Charles Sadler, M. and A. Sower, R. Hogan, J. D. Pringle, C. Polkinghorne, B. C. Thomas, and James Brennan, defendants, are desirous of appealing to the Supreme Court of the United States from the aforesaid order of said circuit court made the 21st day of March, A. D. 1882, remanding said suit to said State court, and are desirous of staying all proceedings under said order of said circuit court remanding said suit to said State court; and whereas, the said intervenors and defendants, whose names are hereinabove on this page recited, have taken an appeal to the Supreme Court of the United States, from said order of said circuit court remanding said
90 suit to said State court, and duly given notice of such appeal and are prosecuting the same, and whereas, said appeal has been duly al-

lowed by said circuit court; and whereas, said circuit court has made an order that all proceedings in said suit and all proceedings under the aforesaid order remanding said suit be stayed upon the execution, approval by said circuit court and filing of a bond on said appeal in the sum of one thousand dollars for damages and costs by reason of said appeal, etc.:

Now the condition of this obligation is such that if the said appellants, Ralph L. Shainwald, as receiver, &c.; Herman Shainwald, as assignee, etc.; J. A. Wright, Isaac Hoffman and S. Hoffman, Joseph Huber, Charles Sadler, M. and A. Sower, R. Hogan, J. D. Pringle, C. Polkinghorne, B. C. Thomas, and James Brennan shall prosecute their said appeal to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

JAMES L. SMITH. [SEAL.]
JACOB DREYFUSS. [SEAL.]

Signed, sealed, and delivered in the presence of—
J. A. MILLER.

91 UNITED STATES OF AMERICA,
District of Nevada, County of Lander, ss:

Jamee L. Smith and Jacob Dreyfuss, the sureties named in and who executed the foregoing bond, being severally duly sworn, each for himself, says that he is a resident and freeholder in said county of Lander, district of Nevada, and is worth the sum specified in the foregoing bond over and above all debts that he owes, and all liabilities and responsibilities he has assumed or incurred, exclusive of property exempt from execution.

JAMES L. SMITH.
JACOB DREYFUSS.

Subscribed and sworn to before me this 10th day of April, 1882.
[NOTARIAL SEAL.] J. A. MILLER,
Notary Public.

I approve the foregoing bond and the sufficiency of the sureties therein named.

Dated April 13, 1882.

LORENZO SAWYER,
Circuit Judge.

(Endorsed:) In the United States circuit court, district of Nevada. I. J. Lewis vs. Harris Lewis et al. Bond on appeal. Filed April 15, 1882. T. J. Edwards, clerk.

92 In the circuit court of the United States, ninth circuit, district of Nevada.

ISAAC J. LEWIS, COMPLAINANT,
vs.
HARRIS LEWIS ET ALS., DEF'TS.

DISTRICT OF NEVADA, *ss:*

I, T. J. Edwards, clerk of the United States circuit court for said district of Nevada, do hereby certify that the foregoing ninety-one written

pages, numbered from 1 to 91 inclusive, contain a true copy of the record and of all proceedings in said cause relating to the order appealed from.

Witness my hand and the seal of said circuit court this first day of August, A. D. 1882.

T. J. EDWARDS, *Clerk.*

[SEAL.]

(Indorsement on cover:) No. 976. Ralph L. Shainwald, as receiver, &c., & Herman Shainwald, assignee, &c., intervenors, J. A. Wright, Isaac Hoffman and S. Hoffman, composing the firm of Hoffman Brothers, et al., appellants, vs. Isaac J. Lewis. Nevada C. C. U. S. Filed 5th October, 1882.

FILED
MAR 15 1883
JAMES H. MCKENNEY, Clerk

10856

NO. 976.

IN THE SUPREME COURT

Of the United States.

RALPH L. SHAINWALD, *Receiver, &c.*, and HERMAN SHAINWALD, *Assignee, &c., Intervenors,*
J. A. WRIGHT ET AL., *Appellants.*
vs.
ISAAC J. LEWIS, *Respondent.*

BRIEF OF COUNSEL FOR APPELLANTS.

T. T. CRITTENDEN,
JAMES L. CRITTENDEN AND
FRANKLIN H. MACKEY.
Of Counsel for Appellants.

Filed _____ *1883*

_____ CLERK,

BY _____ DEPUTY CLERK.

SUPREME COURT

Of the United States.

NO. 976.

RALPH L. SHAINWALD, *Receiver, &c.*, and HERMAN SHAINWALD, *Assignee, &c., Intervenors.*

J. A. WRIGHT, ET. AL., *Appellants,*

vs.

ISAAC J. LEWIS, *Respondent.*

BRIEF OF COUNSEL FOR APPELLANTS.

APPEAL.

This appeal is from an order of the Circuit Court of the United States for the District of Nevada, remanding the above-entitled cause to the State Court from which it had been removed by the intervenors and the defendants. All of the defendants, except Harris Lewis and Abraham Colman, join with the intervenors in prosecuting this appeal.

Defendants Harris Lewis and Abraham Colman, who reside at San Francisco, California, have not appeared in this suit, unless they appeared by Mr. Creswell as parties petitioning the removal, and have not been served with a subpœna or other process.

PROCEEDINGS IN SUIT.

January 15, 1881. Complaint filed in State Court. (Tr. pp. 1–4.)

January 15, 1881. Summons issued. (Tr. p. 5.)

January 15, 1881. Order State Court appointing Joachimsen Receiver. (Tr. p. 11.)

January 17, 1881. Answer of all defendants, except H. Lewis and A. Colman, filed. (Tr. p. 6-8.)

January 17, 1881. Petition of Intervention filed. (Tr. pp. 8–10.)

January 17, 1881. Joachimsen qualifies as Receiver of State Court. (Tr. pp. 12–13.)

January 17, 1881. Notice of motion to vacate order appointing Joachimsen Receiver. (Tr. p. 14.)

January 17, 1881. Petition for removal and bond filed. (Tr. pp. 20–30.)

January 18, 1881. *Approval* of bond for removal of cause. (Tr. p. 30.)

November 10, 1881. Notice of motion to remand filed. (Tr. pp. 31–32.)

November 10, 1881. Affidavits of Colman and H. Lewis denying Creswell's authority to represent them filed. Tr. pp. 32–33.)

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After the removal of said cause into the Circuit Court of the United States, the State Court proceeded as if there had been no removal (Tr. pp. 17–19), although it ordered that Ralph L. Shainwald be allowed to intervene "*as if he had been originally* a party DEFENDANT," (Tr. p. 19), and also ordered that the cause be removed into the United States Circuit Court. (Tr. pp. 30–31.)

STATEMENT OF FACTS.

At the time of the commencement of this suit, and for some time prior thereto, Ralph L. Shainwald, the intervenor, was in actual possession by his agent and

employee, defendant Pringle, of all of the personal property mentioned in the complaint, claiming to be the owner and entitled to the possession and control thereof. (Tr. fols. 52, 15, 23, 4–6.) Said Ralph was also in the actual possession of the store or buildiug in which said personal property was kept by him, claiming to be the owner of said building and the lot on which it was situated. (Tr. fols. 23, 4–5.)

Said Ralph L. Shainwald was at the time, all of said times, and now is, a resident and citizen of the State of California. (Tr. fol. 52.)

Said Ralph L. Shainwald, on November 16, 1880, was duly appointed Receiver of all the property and assets of Harris Lewis, by the United States District Court for the District of California, as a Court of Bankruptcy, in a suit in equity in said Court, wherein Herman Shainwald, as assignee in bankruptcy of certain bankrupts, was plaintiff, and said Harris Lewis was defendant (Tr. fols. 51, 57–60); and said Ralph having qualified as such Receiver (Tr. fols. 23, 24), said Harris Lewis made, executed and delivered to him a written assignment and transfer of all of his property, assets and interests of every name, nature, kind and description, and appointed said Ralph his attorney in fact (Tr. fols. 52, 60–66.) Said assignment, etc., was executed as of *November* 16, 1880, and was duly acknowledged on December 20, 1880.

Said *Harris Lewis* was at the time of the commencement of this suit, and for a long time prior thereto, and ever since has been, a resident and citizen of said State of *California*.

Said Ralph L. Shainwald has ever since been, and now is, such Receiver. (Tr. fols. 21, 23, 51–52.)

The personal property, store, etc., WERE ON NOVEMBER 22, 1880, DELIVERED BY THE PLAINTIFF, ISAAC J. LEWIS, *to the said Receiver's agent and employee* AS THE PROPERTY OF THE SAID H LEWIS, *and were peaceably taken possession of and received by said Receiver's agent and employee*. (Tr. fols. 22–23.)

The plaintiff, Isaac J. Lewis, was at the time of the commencement of this suit, and since has been, a citizen and resident of the State of *Nevada*. (Tr. fol. 52.)

PROCEEDINGS IN SUIT.

January 15, 1881. Complaint filed in State Court. (Tr. pp. 1–4.)

January 15, 1881. Summons issued. (Tr. p. 5.)

January 15, 1881. Order State Court appointing Joachimsen Receiver. (Tr. p. 11.)

January 17, 1881. Answer of all defendants, except H. Lewis and A. Colman, filed. (Tr. p. 6-8.)

January 17, 1881. Petition of Intervention filed. (Tr. pp. 8–10.)

January 17, 1881. Joachimsen qualifies as Receiver of State Court. (Tr. pp. 12–13.)

January 17, 1881. Notice of motion to vacate order appointing Joachimsen Receiver. (Tr. p. 14.)

January 17, 1881. Petition for removal and bond filed. (Tr. pp. 20–30.)

January 18, 1881. *Approval* of bond for removal of cause. (Tr. p. 30.)

November 10, 1881. Notice of motion to remand filed. (Tr. pp. 31–32.)

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STATEMENT OF FACTS.

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employee, defendant Pringle, of all of the personal property mentioned in the complaint, claiming to be the owner and entitled to the possession and control thereof. (Tr. fols. 52, 15, 23, 4–6.) Said Ralph was also in the actual possession of the store or buildiug in which said personal property was kept by him, claiming to be the owner of said building and the lot on which it was situated. (Tr. fols. 23, 4–5.)

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Said Ralph L. Shainwald, on November 16, 1880, was duly appointed Receiver of all the property and assets of Harris Lewis, by the United States District Court for the District of California, as a Court of Bankruptcy, in a suit in equity in said Court, wherein Herman Shainwald, as assignee in bankruptcy of certain bankrupts, was plaintiff, and said Harris Lewis was defendant (Tr. fols. 51, 57–60); and said Ralph having qualified as such Receiver (Tr. fols. 23, 24), said Harris Lewis made, executed and delivered to him a written assignment and transfer of all of his property, assets and interests of every name, nature, kind and description, and appointed said Ralph his attorney in fact (Tr. fols. 52, 60–66.) Said assignment, etc., was executed as of *November* 16, 1880, and was duly acknowledged on December 20, 1880.

Said *Harris Lewis* was at the time of the commencement of this suit, and for a long time prior thereto, and ever since has been, a resident and citizen of said State of *California.*

Said Ralph L. Shainwald has ever since been, and now is, such Receiver. (Tr. fols. 21, 23, 51–52.)

The personal property, store, etc., WERE ON NOVEMBER 22, 1880, DELIVERED BY THE PLAINTIFF, ISAAC J. LEWIS, *to the said Receiver's agent and employee* AS THE PROPERTY OF THE SAID H LEWIS, *and were peaceably taken possession of and received by said Receiver's agent and emp'oyee.* (Tr. fols. 22–23.)

The plaintiff, Isaac J. Lewis, was at the time of the commencement of this suit, and since has been, a citizen and resident of the State of *Nevada.* (Tr. fol. 52.)

Subsequent to the taking possession of said property by said Ralph L. Shainwald, a suit was commenced in the 5th District Court of the State of Nevada, by Herman Shainwald, as assignee in bankruptcy of certain bankrupts, against said Harris Lewis, and a writ of attachment therein issued, and a levy thereunder made by the Sheriff, defendant Thomas, on said property by placing his deputy, defendant Brennan, in joint charge of said property with said Ralph L. Shainwald. (Tr. fols. 22, 24.) Said Sheriff and his deputy continued to hold said property jointly with said Ralph L. Shainwald until after the commencement and removal of this suit.

The defendants, Thomas and Brennan, are citizens of the State of *Nevada*.

Some of said property was removed by said Ralph L. Shainwald to San Francisco, in the State of California, (Tr. fol. 4), *and some of it was sold to citizens of the State of Nevada*, namely: To defendants J. A. Wright, Isaac Hoffman, C. Hoffman, Joseph Huber, Chas Sadler, A. and M. Sower, R. Hogan, Chas. Folkinghorne, and Hoffman Bros. (Tr. fols. 6, 7.)

Abraham Colman, the only other defendant, a citizen of the State of California (Tr. fol. 55), is alleged in the complaint to be a *creditor* of the (pretended) firm of Isaac J. Lewis and Harris Lewis.

The plaintiff prays the State Court, by his complaint, to restrain said Pringle, the agent and employee of said Ralph L. Shainwald, and said Sheriff B. C. Thomas, and his deputy, Brennan, from selling or disposing of any of said property, and also to compel said Pringle, Thomas and Brennan to turn over all of said property to some Receiver to be appointed by said State Court, and that said property be then sold, and the proceeds applied to the payment of the debts of said pretended firm or partnership, and then to dissolve said alleged partnership and have the accounts thereof taken.

Said Harris Lewis and Abraham Colman have not appeared in this suit, unless they joined in the petition for removal, which they deny by affidavit, and it does not appear that either of them has ever been served with any summons, citation, or other process, or will ever apper in said suit.

PLEADINGS AND PETITIONS.

COMPLAINT.

The plaintiff alleges in his complaint:

1. That plaintiff and defendant, Harris Lewis, "on or *about*" the first day of January, 1880, entered into co-partnership, etc., each partner to receive one half of the net profits of the partnership business; business that of general merchandise at Austin, Nev.

2. That *prior to January 1st*, 1880, said Harris Lewis had become involved in certain business complications to which the plaintiff was a stranger, which resulted in a litigation and a judgment against said Harris Lewis in favor of Herman Shainwald, as assignee in bankruptcy of Schoenfeld, Cohen & Co., et al., bankrupts; that said judgment was rendered against said Harris Lewis on the 5th day of November, 1880, by the United States District Court for the District of California; that on said judgment an action was commenced in the United States District Court for Nevada, in which said Ralph L. Shainwald was appointed Receiver of all the estate, real and personal, of said Harris Lewis; that said Receiver and his agent, one Crittenden, on or about November 22, 1880, forcibly entered into the store of said co-partnership at Austin, Nev., and drove the plaintiff out of said store and took possession thereof; that said Receiver and his agent took possession of all money, jewelry and other personal property in said store, shipping some of the same to California; that said Receiver and his agents continue to hold possession of said store, goods, etc., and keep the plaintiff out of said store, etc.; that said United States District Court for Nevada vacated the order appointing said Receiver on December 11, 1880, but that said Ralph L. Shainwald and his agents still retained and retain possession of said store, goods, etc., and exclude the plaintiff therefrom, and are proceeding to sell said goods to pay the judgment of said United States District Court of California; that over $15,000 worth of said goods have been sold by said R. L. Shainwald and his agents for $3,000; that certain of the defendants purchased portions of the goods so sold:

3. That it is impossible to carry on said partnership business, and that the same ought to be dissolved, and the goods and assets thereof sold, and the proceeds applied to the payment of the firm creditors, and any surplus divided between the plaintiff and the successors in interest of said Harris Lewis:

4. That none of the said goods are in the possession of the plaintiff or of said Harris Lewis, but are in the possession of irresponsible persons claiming to be holding the same under the authority of said Ralph L. Shainwald as Receiver; that said Shainwald was not entitled to seize said merchandise, and had no interest therein:

5. That it is necessary that the Court should forthwith appoint a receiver, sell said goods, receive the proceeds thereof, and dispose of the same.

6. That said partnership had contracted certain debts all of which have been transferred to said Abraham Colman, and that said debts are unpaid.

7. Then the complaint prays for a dissolution of partnership and an accounting between the members of said firm, between the firm and its creditors, and between the members and their individual creditors; also that a receiver be appointed to take possession of all the assets of said firm, to collect the property, etc., thereof, etc.; also an accounting between said firm and the persons who had received property thereof; also that the goods sold and carried away, when recovered, be sold, or the accounts of persons taking the same be collected; also that proceeds be applied to payment of debts of partnership and that surplus be paid over to plaintiff and to individual creditors of Harris Lewis; also that defendants, Thomas, Pringle and Brennan, be restained from selling or disposing of said goods and that they turn the same over to the receiver when appointed; also for general relief.

The Receiver of a United States Court who was in possession was not made a party to a suit by which it was sought to dispossess him, and no application for leave to sue him or to take the property from him was made to the Court for which he held the possesion.

Such was and is the complaint in this suit.

ANSWER OF THE DEFENDANTS.

All of the defendants, except Harris Lewis and Abraham Colman, join in an answer, which avers the due appointment and qualification of Herman Shainwald as said assignee in bankruptcy, the due appointment by the United States District Court for the District of California of Ralph L. Shainwald as Receiver of the property of Harris Lewis; that on the 22d of November, 1880, said Receiver as Receiver as aforesaid took possession of all the property mentioned in the complaint, and that he has ever since been and now is in possession thereof as such Receiver of said United States District Court for California; that the defendant, Thomas, as Sheriff, is jointly with said Receiver in possession of said property, the said Sheriff claiming under an attachment in the suit of Herman Shainwald as assignee, etc., vs. Harris Lewis; also that said Receiver and his agent, said Crittenden, took peaceable possession of all of said property, *and the same was delivered peaceably by the plaintiff to said Receiver's agent* AS THE PROPERTY OF SAID HARRIS LEWIS; that said Ralph L. Shainwald has filed a good and sufficient bond as such Receiver to pay all losses or injuries resulting from any of his acts as such Receiver, etc.; and that all of the said goods and property was the property of Harris Lewis at the time when the Receiver took possession thereof on November 22, 1880.

The said answer, in addition to said averments, *denies* that the plaintiff and said Harris Lewis on January 1st, 1880, or at any time entered into any co-partnership or that the plaintiff was to receive one half of said or any business, etc.; that any business was ever at any time carried on by the plaintiff and said Harris Lewis in the store mentioned in the complaint or elsewhere; that goods were purchased on credit at any time by the plaintiff and said Harris Lewis or were received at said store, etc.; that said Receiver or his said agent, Crittenden, obtained or took possession of said store or goods, etc., by force, threats, exhibition of deadly weapons, etc.; that he took possession of said property without authority of law, but did it by virtue of his authority as such Receiver, and as such receiver sold

some of said goods, etc.; denies that any of said goods was sold for less than its value, or that goods worth $15,000 were sold for $3,000; that said Receiver is pecuniarily irresponsible; that any of said property was the property of the alleged partnership, and also denies that the several defendants appropriated the property to their use as is charged against them in the complaint.

The answer then prays that defendants recover their costs and be dismissed. etc.

PETITION OF INTERVENTION.

This petition, filed by the said Herman Shainwald and Ralph L. Shainwald, shows and avers:

1. An interest in the matter in litigation adverse to both parties. 2. The appointment of said Herman as said assignee in bankruptcy. 3. The appointment of said Ralph L. Shainwald as said Receiver of said United States District Court of California. 4. That on November 22, 1880, said R. L. Shainwald as said Receiver took possession of all of the property mentioned in the complaint as the property of Harris Lewis, and that he has ever since been in possession thereof as such Receiver. 5. That on December 13, 1880, in an action brought by said Herman Shainwald against said Harris Lewis, an attachment was issued out of said Fifth District Court of the State of Nevada, and levied by defendant Thomas on said property, the said Thomas as Sheriff entering into joint possession of said property with said Receiver. 6. Sets forth by way of averment all of the matters alleged in said answer, and then denies specially all of the material averment of said complaint.

The petition contains a prayer for permission to intervene and become parties to said action, by uniting with the defendants for the purpose of resisting the claims of the plaintiff; and also that the Receiver of the United States District Court for the District of California be adjudged to have the rightful possession of said property as said Receiver: and also for general relief and for costs.

PETITION FOR REMOVAL.

This petition, which is in due form, and is filed by both of said intervenors and all of the defendants, shows and avers:

1. The commencement of the suit and the relief sought and prayed in the complaint. 2. That the amount involved in this suit is more than $10,000. 3. That the property in this suit exceeds in value $500, exclusive of costs. 4. *That the controversy herein is between citizens of the State of Nevada and a citizen of the State of California.* 5. That the real parties in interest in this action are I. J. Lewis, of the County of Lander, State of Nevada, plaintiff herein, and said Ralph L. Shainwald as Receiver of the United States District Court for California, and said Herman Shainwald as assignee, etc., of said bankrupts. 6. The due appointment of said R. L. Shainwald as such Receiver, and the order [set out verbatum] appointing him such Receiver. *The conveyance, transfer and assignment by said Harris Lewis of all of his real and personal property, interests, etc., to said Receiver under the order of said United States District Court for California, etc., setting forth at length and verbatum the said assignment as a part of the petition.* 8. The recovery by said assignee in bankruptcy of a decree of $98,000 against said Harris Lewis in said United States District Court for California, etc. 9. That said R. L. Shainwald has never been removed from his office as such Receiver. 10. That the defendant Pringle is the duly authorized agent, etc., of said Receiver, and as such agent, etc., holds the possession of said goods, etc., for said Receiver. 11. That said I. J. Lewis, at the time of the commencement of this suit, was, and now is, a resident of the State of Nevada, and that said Ralph L. Shainwald and Herman Shainwald were and are residents and citizens of the State of California. 12. *That the matter in controversy in this suit can be wholly settled and determined between the parties thereto in the Circuit Court of the United States.* 13. "That the defendants, Wright, Colman, Hoffman, Haber, Sadler, A. & M. Sower, Hogan and Polkinghorn, B. C. Thomas, J. D. Pringle, and J. Brennan, *are nominal defendants in said action, and have no interest therein;*"

that the goods purchased by said defendants were sold to them by said Receiver. 14. That said B. C. Thomas is the duly authorized Sheriff of the said county of Lander, and as such levied an attachment on said property on December 13, 1880, and is in possession thereof jointly with said Receiver, the said attachment being in an action in said 5th District Court of Nevada, wherein said assignee in bankruptcy was plaintiff and said Harris Lewis was defendant; that said Sheriff placed said Brennan in joint charge of said property with said Receiver. 15. That said attachment is in favor of said Herman Shainwald, as said assignee in bankruptcy, and that said controversy between the plaintiff and the said Brennan and Pringle is a controversy to which the said assignee in bankruptcy and the said Receiver are the actual parties in interest, *and is wholly between* citizens of different States, and can be fully determined as between them. 16. That said Ralph L. Shainwald, as such Receiver, and said Herman Shainwald, as such assignee in bankruptcy, holding the possession of said property, have filed in this action their "petition of intervention," which is hereby referred to and made a part of this petition. 17. That the controversy in this action between said plaintiff and said intervenors holding said property as aforesaid, is between said plaintiff, a citizen of the State of Nevada, and the said intervenors, citizens of the State of California, "and can be fully determined as between them." 18. That said petition of intervention, and the answer of the defendants, deny the existence of any partnership between the plaintiff and the said Harris Lewis, and allege that all of said property was the sole property of said Harris Lewis. 19. That said petition and said answer are hereby referred to and made parts of this petition. 20. *That the defendants, Abraham Colman and Harris Lewis, are citizens of the State of California.* 21. That this is the first term of this Court at which this suit could have been tried since its commencement. 22. That your petitioners desire to remove this suit into the United States Circuit for the District of Nevada. 23. That your petitioners herewith offer a bond, with good and sufficient surety, for their entering into said Circuit Court of the United States, on the first day of its next session, a copy of the

record in this suit, and for payment of costs, &c., &c. 24. "And your petitioners further show that they have authorized their attorney, H. L. Creswell, in the above entitled suit, to sign this petition for the removal of the said suit into the said Circuit Court, and authorized said attorney to remove said suit to the United States Circuit Court for the District of Nevada." 25. *That on December* 11, 1880, *in the United States District Court for the district of California,* in a suit therein pending between Herman Shainwald, as such assignee in bankruptcy, as plaintiff therein, and said Harris Lewis, Abraham Colman, and B. C. Thomas as defendants therein, issued an injunction against said Lewis, Colman, and Thomas, restraining and forbidding them and their agents from intermeddling or interfering with any of said property, under or in execution of any writ or process of any Court or otherwise (the injunction is made a part of this petition), and that said injunction is still in force.

The petition then prays that "this (the State) Court proceed no further herein, except to make the order of removal required by law, and to accept the said sureties and bond, and to cause the record herein to be removed into said Circuit Court of the United States for the District of Nevada, and your petitioner will ever pray, &c.

Said petition was duly signed, verified, and filed on January 17th, 1881, with the bond required by the United States Statutes, which said bond was duly approved by said State Court on the next day, January 18th, 1881.

On January 20th, *the record was transmitted to and filed in the United States Circuit Court.*

POINTS AND AUTHORITIES.

I.

THE SUBSTANTIAL CONTROVERSY, THE REAL CONTEST IN THIS SUIT, IS BETWEEN THE PLAINTIF, A CITIZEN OF THE STATE OF NEVADA, AND RALPH L. SHAINWALD, A CITIZEN OF THE STATE OF CALIFORNIA.

(*a.*) What are the controversies involved in this suit?

Can there be any doubt that said Ralph L. Shainwald has *some interest* involved in a suit in which the plaintiff seeks to take valuable personal property from the possession of his employee, Pringle, to restrain said employee from selling or disposing of any of said property, and to transfer the said property to a stranger for sale, that the proceeds may be applied for the benefit of the plaintiff, or of a firm of which he claims to be a member? Can it be doubted that such a suit necessarily involves a *controversy* between the plaintiff and said Ralph? or that said controversy is a *real and substantial* one, if the said Ralph claims the right to and ownership of said personal property, and in good faith intervenes in said suit to protect his rights and title?

Is not the person in the actual possession of personal property and claiming to be the sole and exclusive owner thereof a *necessary and indispensable party* to a suit which is prosecuted for the purpose of depriving him of the possession of said property and having it adjudged that he is not the owner thereof? Is his agent or employee a necessary or indispensable party to such a suit? Is the person from whom he obtained the possession and title to said property a *necessary or indispensable* party to such a suit, especially when he makes no claim whatever to said property or to the right of possession thereof?

Can the real nature and character of such a suit for personal property, or the real and substantial controversy involved in it, be radically changed merely by the bringing and prosecution of such a suit by a partnership or a member of a partnership? Or by averring title or ownership on the part of a partnership? Or by the seeking to have said property not only taken, but applied to the payment of the debts of the alleged partnership? Does the prayer that a certain *application* of the proceeds of the property when taken and sold change the real nature of the suit? Does an averment that a *partnership* owns said property change the real nature of the suit?

Is it not merely a suit to recover the possession of personal property, whether it be prosecuted for the

benefit of an individual or of a partnership, and whether any sale or other disposition of the property is prayed for in the complaint or not?

(b.) The question of the ownership is of the personal property mentioned in the complaint the real and substantial controversy in this suit.

The complaint alleges that said personal property is owned by a certain partnership of which the plaintiff is a member, that the said property was wrongfully and unlawfully taken from said partnership by the agent of said Ralph L. Shainwald; that said Ralph L. Shainwald has sold a part of said property to certain of the defendants; that the said Shainwald has sent part of paid property to California; that the remainder of said property is "*in the possession of irresponsible third persons, who claim to hold the same under pretended authority of said Shainwald,*" and "that it is impossible to proceed with the business of said co-partnership and the same ought to be dissolved," and the stock and effects of said partnership ought to be sold, and the proceeds applied in payment of partnership debts.

The petition of intervention, and the petition for removal admit and aver the taking possession of said property by Ralph L. Shainwald s agent, and the sale and transfer of some of it to certain of the defendants, and the possession of the remainder of said property by defendant Pringle as agent and employee of said Ralph L. Shainwald, but deny that there ever was any such partnership, and aver that said property was delivered to tho agent of said Ralph by said plaintiff peaceably as the property of Harris Lewis, and that said Ralph is the owner of all of said property in the possession of said Pringle.

It is obvious, we submit, that the real object of this suit is the recovery of the possession of said property from said Ralph L. Shainwald, and therefore there is a substantial and real controversy between the plaintiff and said Ralph as to the possession and ownership of said property. Wood et al vs Dann 18 How 467

It is not averred in the complaint or pretended that any one of the defendants, except said Ralph, claims to be in the actual possession of said property, or claims

to have control and dominion over the same; for the possession of Sheriff Thomas and his deputy, Brennan, is subordinate to the possession of said Ralph, and under an attachment in favor of Herman Shainwald, as assignee, etc., a citizen of California. To this controversy for the possession of said property it is difficult to see how anyone besides the plaintiff and said Ralph can be necessary or indispensable parties. No one of the other defendants has any immediate or real interest in such a controversy. Harris Lewis has parted with all his interest to said Ralph. Colman does not pretend to have any title or claim to any of said property, and it is merely avarred in the complaint that he is a creditor of said pretended partnership.

A creditor of a partnership is not a necessary party to a suit for the dissolution of the partnership, whether the partnership be admitted or denied.

Collyer on Law of Partnership, Sec. 296 and cases cited.
Drew vs. Drew, 2 Vesey and Beames 159.
Sanders vs. King, 6 Maddock's, 61.
Harris vs. Harris, 3 Hare, 450.
Jacobs vs. Goodman, 2 Cox's Ch. Cases, 282.
Donegal vs. Stewart, 3 Ves. Jr., 446.
Mitford's Pl. in Chancery (6th Am. Ed.), pp. 370. 371, and numerous cases cited in note *a*.

Much less is he a necessary party to a suit by the partnership or by a member of the partnership, to recover the possession of personal property, and we doubt that it will be simply pretend that he is even a proper party to any such suit.

It seems to be well settled that the only *necessary* parties to a suit for the dissolution of a partnership and for an accounting and the payment of the debts thereof, are the members of the partnership or their successors in interest.

Collyer on Partnerships, Sec. 232 and numerous cases cited.

The said Ralph claims and will prove that said property was the separate property of said Harris Lewis, and that it never was owned by said pretended partnership. (Tr. fol. 55.)

We snbmit that the question of the ownership of said property must be determined before the said Ralph can be deprived of his possession and enjoyment thereof; that it must be established that said partnership exitsed and was the owner of said property, and has not parted with the title or right of possession, before the said Ralph L. Shainwald can be deprived of said property; and that it must be proven that the actual possession of said property has not been peaceably transferred to said Ralph L. Shainwald by said alleged partnership, before said property can be taken from said Ralph.

Let it be supposed that said partnership should be established, and that said property was transferred or surrendered by said partnership to Ralph L. Shainwald, upon a demand under claim of title made by said Ralph or his agent, how could the possession of said property be lawfully regained by said partnership, except by an action at law or a suit in equity against said Ralph L. Shainwald? How could said Ralph be deprived of said property, or of the possession thereof, except by some suit or action against him for that purpose? How could his rights be determined or passed upon, or property in his possession under claim of title be taken from him, except in a suit or action against him in which his title would be tried and determined?

Now, who wouldbe necessary parties to such a suit or action? Wouldnot said Ralph be a proper, necessary, and indispensable party to such an action? Would anyone but the said supposed partnership or the members thereof, be necessary, or even proper parties plaintift in any such action or suit? Would not the only real, or substantial issue in such an action or suit be, whether said Ralph L. Shainwald, or said supposed partnership, had the right to the possession of or the title to said property? Would any or all of the partnership creditors, or any or all of the individual creditors of the members of the alleged partnership be necessary, or even proper parties to such a suit or action? Are the creditors of a partnership necessary or proper parties to every suit or action brought or prosecuted by a partnership for the recovery of the possession of real or personal property claimed

by said partnership? That they are not, see authorities above cited.

It is obvious, we think, and requires no citation of authorities to show that the only necessary parties to any and every suit in equity, or action at law, in which a controversy between a partnership and a third party, as to the right of, possession of, or title to real or personal property is sought to be determined, are the partnership or its members, and the adverse claimant or third party. It is also obvious, we think, that the real, main, and substantial controversy in every such suit or action, is only between said partnersnip and its members, and the claimant or third person, in possession or or occupying the property. In every such suit of action. the interests of the firm creditors must necessarily be affeeted by the result; yet, it has never been held, we believe, that any of them were necessary or proper parties to such a suit—probably because their interests are represented by the partnership, and also because of the remoteness of their interests. If the creditors of the partnership were necessary or proper parties to such a suit or action, because their interests might be affected by the result, then would not the creditors of the several members of the partnership also be necessary or proper parties for the same reason.

Again. In such a suit or action, would it not be necessary to allege that there was a partnership between the plaintiffs, and that the partnership owned the property? If the defendant in such a suit or action denied both the existence of the partnership, and the title, right of possession and ownership, on the part of any such partnership, and averred that he, the defendant, was alone the owner and exclusively entitled to the possession of said property, would not the plaintiffs have to establish both the partnership and the title of the partnership to the property, and its right to the possession of the property? Would not the controversy then be as to the ownership of the property, and would not the issue as to the partnership be merely a question incident to and arising from and out of the controversy. Would not these be the material

questions involved in such a suit? Could the partnership recover without establishing the partnership, and title and right of possession in the partnership? We submit that it could not.

AGAIN: Let it be assumed that there exists a partnership between two men, and that one of those men owns in his individual right certain personal property which he sells and assigns to a stranger to the partnership, and that the stranger obtains possession of that property with or without the consent of the partnership, could said partnership or the members thereof, or either of the members thereof, deprive said stranger, so in possession under claim of title, of said property, or of his possession thereof, except by some action or suit brought against him to test and determine said stranger's title and right of possession? Could said property be taken from said stranger in any action or suit to which he was not a party? Would a mere suit to dissolve said partnership and distribute its assets, and an allegation in the complaint in the suit for dissolution that the said partnership owned said property and were unjustly deprived thereof by said stranger, enable said partnership or the members thereof to deprive said stranger of said property? Would not there have to be, in the first place, a trial and determination as to the title and right of possession of said stranger as to said property in some suit or action against said stranger, in which said stranger would be the principal and only necessary party defendant, and said partnership or its representatives (its receiver or assignee) the only necessary party plaintiff? Would not the main and substantial controversy in such a suit or action be as to the title and right of possession of the stranger, and, if the partnership was denied, whether said partnership ever existed, and if it did, whether it ever had any title to said property?

Now, can one of the members of such an alleged partnership by bringing a suit for dissolution thereof and making the agents and employees of said stranger (or those who are in possession of said property for said stranger) parties to said suit, escape or evade a trial and adjudication of the title and right of possession set up by said stranger? Can he by such a suit for dissolu-

and employees of said Ralph L. Shainwald) but said Shainwald and his agents and employees refused to surrender said merchandise and said store, and continued by force and violence to hold the same and to keep this plaintiff deprived of the possession thereof; and said agents and employees of said R. L. Shainwald there upon proceeded to advertise for sale said merchandise?"

Why does plaintiff aver in said complaint "That all of said goods, wares and merchandise, sold and unsold are the property of said firm, but are no longer in the possession of the plaintiff, nor the defendant, Harris Lewis, but in the possession of irresponsible third persons, who claim to hold the same under pretended authority from said Shainwald as Receiver; and that said persons have already sold and wasted and lost a large part of said stock, and threaten to again commence to sell the same, and it is necessary the Court should appoint a receiver (of said property so held adversely) forthwith, should sell out said stock and receive the proceeds thereof into Court to be disposed of according to justice and equity, and the liens of the creditors and partners?"

Why does the plaintiff pray in said complaint that the agents and employees of said Ralph L. Shainwald (J. D. Pringle and J. Brennan), turn over said merchandise and property to a receiver, whom he prays may be appointed in this suit?

Why does he pray for the appointment of a receiver of property which he swears is in the possession of said Ralph L. Shainwald?

Why does he pray that the receiver, whose appointment he prays for, proceed by order in this suit to take the possession of the said property and dispossess said Ralph L. Shainwald?

Why does he pray that said property be sold, the proceeds applied to the payment of the debts of said pretended partnership?

Why does he pray that said receiver, when appointed in this suit, take from the other defendants the property sold to them by said Ralph L. Shainwald, and which he avers has bee appropriated by said defendants to their own use?

Why are all of these allegations of tortious acts on the part of said Ralph, in the taking, detention and conversion of said property made in said complaint, if the *recovery of the property* is not the *real object* of the suit? Why is the recovery of the property—why is the restraining any sale or removal thereof, the principal and only real relief prayed for in said complaint.

Will it be pretended that this complaint in this suit does not aver either a cause of action in trover against said Ralph L. Shainwald? or a cause of action against him for the possession of said personal property? or that it does not aver and set forth similar causes of action against all the other defendants except Harris Lewis and Abraham Colman? or that the causes of action against the several defendants for conversion or for the possession of property alleged to belong to said firm are not separate and distinct causes of action from the cause of action set forth against said Ralph L. Shainwald? Is it not averred in said complaint that the several defendants converted different parts of the said merchandise, while it is also averred that said Ralph L. Shainwald converted all of said merchandise to his own use?

Will it be pretended that separate and distinct actions could not have been brought against each of the said defendants who are alleged to have taken and unlawfully appropriated to their own use the said merchandise? or that the several causes of action against them are not necessarily distinct and separate causes of action?

Surely a cause of action against one person who has converted all of the goods in a certain store, is not the same as a cause of action against a person who has received from him and appropriated olny one-twentieth part of those goods? surely a cause of action against a person in possession of certain goods, is not the same as a cause of action against any other person for other goods of which that other person is in possession?

AGAIN. Assuming for the purpose of argument, that this action was brought against Harris Lewis as the sole defendant, and that Harris Lewis had never assigned all of his property to said Ralph, and that said Harris Lewis admitted the partnership, but denied that the

partnership owned said property, and averred that he was the owner and rightfully in possession thereof, would not the *real* and *substantial* controversy then be as to the *ownership* of the said property? Would there be any other *controversy?* If, instead of admitting, suppose he denied the partnership, would the question of *ownership* not still be and remain the *real* and *substantial controversy?* Would the mere addition of another issue—that as to the partnership—destroy or dispose of the real controversy? Would he be less the owner of the property because he denied the existence of the partnership? Would the property cease to be, or become less, the real object of the suit—or its recovery cease to be the real relief sought—because the existence of the partnership is denied?

Would the persons to whom said Harris Lewis might have sold some of the property in dispute, be necessary or indispensable parties to such a suit? Would any creditor of the alleged partnership be a necessary or indispensable party to the final determination of such a controversy between the plaintiff and said Harris Lewis?

The complaint shows that different defendants are in possession of different goods claimed by the plaintiff, or the alleged firm.

AGAIN. How can it be pretended that the defendant, who claims property and is in possession thereof under claim of title, can be deprived of that property except by a suit or action to try his right to that property?

Still less can a man be deprived of property in his possession under claim of title, in an action or suit to which he is not made a party. Yet this is what the plaintiff sought to do in this suit, by omitting the name of said Ralph L. Shainwald from those the parties sued as defendants.

If the employees of a person in possession of personal property under claim of title are necessary parties to a suit in which it is sought to deprive him of the possession of said property, surely that person is a necessary party; for he alone has, or claims to have, the title or the possession, and he alone will be affected by such attempt to deprive his employees of the possession which they hold for him.

AGAIN. Is it not obvious that the principal and real object of this suit is to deprive said Ralph L. Shainwald of the possession of said property, and not to dissolve said alleged partnership?

If this suit was really for the purpose of dissolving said pretended partnership, why are the adverse holders and claimants of personal property made parties to it, although it is not averred or pretended that any of them are, or ever were, creditors of said pretended partenrship?

If dissolution of partnership was the real object, why unite so many and different causes of action against persons who cannot be pretended to have any interest in the matter of such dissolution? Why attempt to capture property belonging to, and adversely held by such strangers to said alleged partnership?

Is it not apparent from the averments of said complaint that there are no assets of said pretended partnership to distribute, unless strangers to said partnership are deprived of property which they claim and hold adversely to said pretended partnership and to all the world?

AGAIN: Is it not obvious that this suit is an ingenious and fraudulent attempt, under the guise of a suit to dissolve a pretended partnership, to secure property held adversely to the plaintiff and to said alleged partnership? To deprive strangers to said pretended partnership of property which they claim and hold as their own, without giving said strangers an opportunity to have a full and impartial trial of their title and right of possession? To evade the jurisdiction of the U. S. Courts by changing the form of action?

AGAIN: Can it be doubted that there is a real and substantial controversy between the said Ralph L. Shainwald and the plaintiff as to who is entitled to the possession of said property, and as to who is the owner thereof?

We respectfully submit that if this Court has any such doubt, an examination of the pleadings on file will dispel it enterely.

Is not said Shainwald in possession of said property, claiming and exercising absolute control, dominion and ownership of the same?

(*c.*) Another question in this suit is, as to whether there ever was, or now is, any such partnership as is alleged in the complaint.

This partnership is averred in the complaint and denied in the answer and also in the petition of intervention, and in the petition for removal.

It is not a little singular that the plaintiff omits to state the name under or by which said pretended partnership existed and carried on business, or the amount of capital, if any, which he contributed to the partnership capital or business.

It is also strange that he should allege himself to be a creditor of said pretended partnership. (Tr. fol. 2.)

No parties to this suit except the plaintiff and said Ralph have any actual or real interest in this question?

What interest has Colman in this controversy? Is his interest such as to make him a necessary party to the controversy? Cannot the controversy be decided without his being made a party to the suit?

Is said Colman anything more than a creditor of the alleged partnership? Is every creditor of a partnership a necessary party to a suit in which the partnership is alleged and denied? That a creditor of a partnership is not a necessary party to a suit to establish the partnership, see

Collyer on Partnership, Seco. 296, 232, and numerous cases cited.
Mitford's Ch. Pl.. pp. 370-371, and numerous cases cited
Drew vs. Drew, 2 Vesey & B., 159.
Sanders vs. King, 6 Maddock's, 61.
Harris vs. Harris, 3 Hare, 450.
Jacobs vs. Goodman, 2 Cox's Ch. Ca. 282.
Donegal vs. Stewart, 3 Ves. Jr., 446.

That the partners or their successors are the only necessary parties to such a suit, see

Collier on Law of Partnerships, Sec. 232, and numerous cases there cited.

Story says: "The rule as to *necessary* parties does *not* extend to *all* persons who may be *consequentially interested or affected* by the suit, as, for example, in the case of a bill by a creditor for the payment of his debt out of the assets of his deceased debtor, whether it is a suit brought for himself alone, or on behalf of all others. In the former case, all the other creditors may be consequentially affected by the decree; in the latter, all the legatees and distributees."

Story's Eq. Pl. (9th Ed.), Sec. 226.

The said Colman has never appeared or been served with process in this suit.

What interest has the defendant, Harris Lewis in this suit? That he has no beneficial or pecuniary interest whatever in the *result* of the suit is apparent, for he has assigned to said Ralph L. Shainwald *all* of his property, real and personal, and all interest he had in any property or business whatever. If he ever was a partner in any such firm, his assignment terminated his connection with it, terminated the partnership, and transrerred all his rights and interests in it to said Ralph L. Shainwald. How can he, Harris Lewis, be either an indispensable or a necessary party to a suit in which he has no interest whatever and in regard to the subject matter of which he has parted with all his interests and rights?

What interest has anyone of the other defendants in said contest as to the partnership? It is not alleged or pretended that any of them are interested in the alleged partnership as members thereof, or that any of them claims any of the money or property in possession of the employee of said Ralph L. Shainwald. It is merely alleged that the other defendants, those who are citizens of Nevada, have received, taken and converted to their own use some of the personal property of the alleged partnership. It is not alleged that said Ralph claims any of the property which has been converted or received by these other defendants.

If said Ralph received money for the personal property which he sold to these other defendants who reside in Nevada, and the plaintiff seeks to recover that money as money belonging to said alleged partnership, there can hardly be any doubt that the controversy as to that

money is exclusively one between said plaintiff and said Ralph, for the said money is claimed by said Ralph as his own property, and as the proceeds of property which belonged to said Harris Lewis in his individual right.

Nor is it alleged or pretended that any one of the defendants who are citizens of Nevada claims to be or is a creditor of said alleged partnership, or of any member thereof.

The plaintiff is a citizen of Nevada; Ralph L. Shainwald, Abraham Colman, Herman Shainwald and Harris Lewis, are citizens of California.

This question of partnership or no partnership is one wholly between said plaintiff and said Ralph, and is, we think, a mere *incident* to the controversy for the recovery of the personal property. Even if the partnership should be established, the plaintiff will be defeated, for it will be established that this very property was purchased with, and arose from the use of, trust funds, of which said Harris Lewis was and has been decreed to be the trustee, by a final decree of the United States Court in Bankruptcy, and that said Ralph L. Shainwald was appointed and is receiver of said trust funds, and of the property and money realized by the investment and use of said funds.

AGAIN: This action is, we submit, one clearly sounding in *tort*, and *not* in *contract*.

It is not pretended that there ever was any *contract* between said alleged partnership, or the plaintiff, and any of the defendants, which the plaintiff, or said alleged partnership, seeks to enforce.

In this respect this action is radically different from the action of Hyde vs. Ruble, 104 U. S., 407–410. In that action the plaintiff sued upon a contract of bailment to which he averred each and all of the defendants were joint parties, while in this action the said Ralph is charged with wrongfully and unlawfully taking, detaining and appropriating to his own use, money and personal property belonging to an alleged partnership, of which the plaintiff claims to be a member. This charge against said Ralph is material, and unless proven and found by the Court, the plaintiff cannot recover.

All of the averments of the complaint in this action *repudiate* the idea of any agreement or contract between

the plaintff and said Ralph, or between said alleged partnership and said Ralph, and assert that all of said acts were wrongful and unlawful *ab initio*.

If the question of *partnership* was *not* the *real* controversy in *Hyde vs. Ruble*, where the plaintiff averred and the defendants denied the existence of the partnership, and the object of the action was the recovery of money due upon a *contract* alleged to have been made by the defendants jointly as partners, how can that question be the *real* controversy in *this* action, in which the plaintiff bases his cause of action solely and exclusively upon the *tortious* taking, detention and conversion of money and personal property, averred to be the property of the alleged partnership?

In McGuinity vs. White, removed into the U. S Court under the Act of 1866, Dillon, J., held, that the suit was properly removed, although it was a suit against *partners* to recover an indebtedness of the *partnership* in a State where the partnership business was carried on, and where one of the partners and the plaintiff resided.

3 Dillon, 350, 355, 356 (1874).
Dillon's Removal of Causes (2d Ed. p. 57..)

AUTHORITIES.

If the *main controversy* is between the plaintiff and the defendant, Ralph L, Shainwald, then the suit was properly removed into the U. S. Circuit Court.

103 U. S. R. pp. 212-216, 336.

If the real (controversy) litigation is between citizens of different States, the case is within the constitutional grant of federal judicial power, notwithstanding some of the adversary parties may happen to be citizens of the same State.

Donohoe vs. Mariposa Land Co., 5 Sawyer, 170.
Dillon on Removal of Causes, p. 30.
Osgood vs. Chicago D. &. V. R. R. Co., 6 Bissell, 334. (Held that *judgment creditors* in foreclosure suit are not *necessary* parties.)
Barney vs. Latham, 103 U. S. R. 205-216. (The decision in this case rendered in *October* 1880, disposes of all the questions involved in the case at bar, we think.)

Howell vs Phelps
105 United States Reports S.C.

"The intention of Congress plainly expressed in the Act of March 3d, 1875, was, that where the main controversy was between citizens of different States, it was removable, and carried with it all the incidents; and that a mere incident would not prevent the case from being removed."

103 U. S. R. pp. 212-216, Id. pp. 335-336.

Donohoe vs. Mariposa Land Co., 5 Sawyer, 170-171.

Dillon on Removal of Causes, p. 35, Note.

Turner Bros. vs. Indianapolis B. & W. R. R. Co. et al., cited Dillon's Removal of Causes pp. 34-35 (Held that the substantial controversy was between the mortgagees and the owner of the property, (in that case the mortgagor,) *and that the claims of other creditors who could only share in the surplus after the satisfaction of the mortgages*, if there should be any surplus, "were merely an incident to the main controversy about the mortgages.")

Goodenough vs. Warren et al. 5 Sawyer 497, and cases cited (1879). (In this case the question arose under Sec. 639, U. S. Rev. Stat., and Sawyer J., concurred with Judge Deady.)

Girardy vs. Moore, et al., 5 Cent. L. J. 78-79, (1877).

Wormser vs. Dahlman, The Reporter, vol. 7, p. 740-741 (1879.)

Taylor et al. vs. Rockafeller, et al., The Reporter, vol. 6, pp. 226-229. (1878)

(a.) The defendants Colman and Harris Lewis must be "necessary *adverse* parties" to the said Ralph L. Shainwald, or the objection to the removal cannot be sustained.

103 U. S. R. pp. 212-216.

Arrapahoe County vs. Kansas Pacific R. R. Co., 4 Dillon, pp, 282, 285, 286 (1878.)

Turner Bros vs. Indianapolis B. & W. R. R. Co. *supra.*

Goodenough vs. Warren et al., 5 Sawyer, 497.

Girardy vs. Moore, et. al., *supra.*

Wormser vs. Dahlman et al., *supra.*

Taylor et al., vs. Rockafeller et al., *supra.*

II.

THE CONTROVERSY BETWEEN THE PLAINTIFF, A CITIZEN OF NEVADA, AND RALPH L. SHAINWALD, A CITIZEN OF CALIFORNIA, IS A SEPARATE AND DISTINCT CONTROVERSY, TO WHICH NONE OF THE OTHER DEFENDANTS IS A NECESSARY OR INDISPENSABLE PARTY.

(*a.*) The wrongful and unlawful taking, detention and conversion by said Ralph, of money and personal property of said alleged partnership, which is alleged in said complaint, is not charged to have been committed jointly with any other defendant to this action.

(*b.*) The money and property alleged to have been wrongfully taken, detained, and converted by said Ralph, is not claimed or alleged to be claimed by any other party to this action than the plaintiff.

(*c.*) It is not averred or pretended that any other party to this action than said Ralph, is or claims to be the owner or successor, by assignment, of all or any of said Harris Lewis' property.

(*d.*) No other party to this suit than said Ralph, can be held to have succeeded to said Harris Lewis' interest in said alleged partnership, if the same ever existed.

(*e.*) The said Ralph, as such Receiver, can alone claim said money and property as trust funds, and the proceeds of trust funds.

(*f.*) If said Ralph is a necessary party to any controversy in this action, it is to one in which none of the other defendants has any interest, in common or jointly with him.

(*g.*) The question as to whether there was any partnership between the plaintiff and Harris Lewis, is one to which said plaintiff and said Ralph, as the successor by assignment to all of said Harris Lewis' property and interests, are the only necessary and indispensable parties.

(*h.*) If said Harris Lewis and Abraham Colman were necessary or indispensable parties to this action, the right of said Ralph to have this action removed into the United States Circuit Court, cannot be thereby defeated, as neither of them has been served with process or appeared in this action.

The fact that persons are made defendants by the complaint, who have not been served, or have not appeared, will not defeat the right of removal.

Ex parte Girard, 3 Wall., Jr., 263.

It is hardly likely that Harris Lewis will ever appear as a party to this suit, as he is enjoined from intermeddling, or doing anything whatever in regard to any of this property assigned by him to said Ralph, and he has appointed said Ralph his attorney in fact, to appear for and represent him in all suits and actions relating to his property. (Tr. fol. 65.) This assignment has been made final by the final judgment of the Circuit Court of the United States, rendered on appeal.

Said Colman has also been enjoined from intermeddling or interfering, &c., with said property held by said Ralph. (Tr. fol. 69, 70.)

That said Colman, as a creditor of said alleged partnership, is neither an indispensable or a necessary party to the controversy between the plaintiff and said Ralph, we have shown, we think, in our argument of Point I.

That as such creditor said Colman is not a necessary party to such a controversy is well settled by the authorities, we believe. (See authorities cited *supra* on page 14 of this Brief.)

If said Harris Lewis is a necessary or indispensable party to the controversy between the plaintiff and said Ralph, then a seller of personal property must be held to be a necessary and indispensable party to a suit by an adverse claimant against the purchaser and holder thereof for the recovery of the possession of said property.

(*i.*) Every interest on the part of Harris Lewis in any of the controversies in this suit has been and is vested absolutely in said Ralph by the general assignment made by said Harris Lewis to said Ralph.

Said assignment gives to said Ralph a power of attorney, whereby he is authorized "*in his* (Harris Lewis) *name to commence, continue, discontinue, and again bring, perfect and carry out actions and suits against any corporated company,* FIRM, *persons or person, for or on account of all or any part of said* (his) *property and estate and other effects.*" (Tr. p. 26, fol. 65.)

If this power of attorney means anything it authorizes the petition of Mr. Creswell on the part of said Harris Lewis for the removal of this cause into the Circuit Court, said Creswell being instructed and employed by said Ralph so to do.

AGAIN: If the assignment made by Harris Lewis to Ralph L. Shainwald did of itself immediately operate as a dissolution of the pretended partnership, as asserted by Mr. Lake on page 11 of his brief, then there can be no necessity for a suit for dissolution, for the dissolution has already taken place; and if such dissolution has already taken place by the act of Harris Lewis in assigning all his interest in the partnership and its property, it is difficult to see how said Harris Lewis can have any interest in the said partnership property or in what becomes of the same, or how said Harris Lewis can be a necessary or even proper party to a suit or controversy about property in which he has no interest. Is he not an absolute stranger as much as if he never had any interest either in the said alleged firm or in any of the property thereof? Is the seller or assignor of property a necessary party to a suit between his assignee and an adverse claimant of the property? If so, how many of the prior owners are necessary parties?

If the pretended partnership has been dissolved by Harris Lewis' assignment to Ralph L. Shainwald, there is no partnership to dissolve! If Harris Lewis has sold and assigned all of his interest in the alleged partnership property, he has no interest therein to be litigated! If said Harris Lewis has assigned all of his interest in the pretended partnership to Ralph L. Shainwald, then said Ralph is the only person interested in the property of said firm—he alone is the successor of said Lewis in said partnership and legal owner of said Harris Lewis' interest therein! How can Harris Lewis be a necessary party to a suit about property in which he has ceased to have any interest whatever?

AGAIN: It is not sought in this suit to recover for the creditors of said pretended partnership any of the separate property of the partners as such, and hence it is not in any sense *a suit by creditors* to enforce their claims against the members of the pretended partnership. Therefore it is not a controversy between said

Harris Lewis and his creditors for the application of any of his property to the payment of their claims.

Nor is the defendant, Herman Shainwald, a citizen of California, a necessary or indispensable party to the controversy between the plaintiff and said Ralph.

He does not claim any right, title, or interest in any of said money or property adversely to said Ralph, but avers that said Ralph is the rightful owner and in rightful possession of all of said money and property, and unites with said Ralph in his petition of intervention, and in that for the removal of the suit to the U. S. Circuit Court. Said Herman Shainwald does not claim to be owner or entitled to the possession of any of said property and money, or to have any interest in said alleged partnership.

The interests, position and conduct of said Herman Shainwald in this suit have been and are hostile and adverse to the plaintiff. Defendants Thomas and Brannan, who levied an attachment upon said property in a suit brought by *Herman Shainwald* against Harris Lewis, are not necessary or indispensable parties to the controversy between the plaintiff and said Ralph.

Ralph L. Shainwald was not a party to said suit, and he did not bring said suit. He was in possession of all of said property and remained in possession thereof from the time when said attachment suit was brought by Herman Shainwald down to the time when he was forcibly dispossessed after the removal of this suit to this Court. If the sheriff levied an attachment upon said property while in the possession of said Ralph L. Shainwald, and said Ralph was the lawful owner and holder thereof, then the sheriff is liable for damages for his trespass or conversion, whichever it may have been. The attachment proceedings could also be set aside in the State Court where the attachment suit is still pending.

The pleadings show that said Ralph still retained possession of all of said property, and that the sheriff did not pretend to take it out of his possession by virtue of said attachment, thereby recognizing the said Ralph's right of possession.

The averments of the petition for removal show that the Sheriff in levying his attachment recognized the pos-

session of said Ralph, and that he did not undertake or attempt to deprive said Ralph of the possession thereof, but merely "placed defendant Brennan in joint charge of said property with said" Ralph L. Shainwald, the petitioner for removal. This was solely an act of the Sheriff, which the said Ralph could hardly have prevented, and for which he is certainly not responsible. His possession was adverse to the Sheriff and to everybody else, and he unquestionably has his right of action against the Sheriff for this trespass. The very fact that the Sheriff, a citizen of Nevada, also claims this property adversely to said Ralph makes the Sheriff a party plaintiff so far as the right of possession of said Ralph is concerned.

There is no averment in any of the pleadings or in the petition showing that the Sheriff and said Ralph claim or ever claimed or pretended to hold said property jointly or by or under any joint or common title or interest. The Sheriff in order not to render himself liable, or probably with some such idea, did not deem it prudent to dispossess said Ralph, and so merely placed a man of his own in the place where the goods were, leaving the said Ralph still in full possession.

The complaint itself avers unequivocally the adverse and open possession of said Ralph L. Shainwald's agent, defendant Pringle, and that said Shainwald threatens to dispose of all of said property, and that he is exercising other acts of absolute and independent dominion and control. How can these averments be reconciled with the idea of a joint possession by said Sheriff with said Ralph L. Shainwald? The rights and possession of Ralph L. Shainwald must not be confused with those of Herman Shainwald, for it is not averred in any of the pleadings or petitions that said Herman's possession was disturbed by said Sheriff, or that said Herman was ever in possession in his own right. We maintain that there never was any joint possession of said property by the Sheriff and either of the Shainwalds, but that the Sheriff's attempt to take said property and to put a man in charge while said Ralph held the same was a hostile action and a trespass. The Sheriff finally came to that conclusion, for (as ap-

pears by affidavits on file in the U. S. Circuit Court) he abandoned all claim to the possession soon after the commencement of this suit, and subsequently, after the removal of this suit into the U. S. Circuit Court and the filing of the transcript in said Court, went with a body of armed men and forcibly dispossessed said Ralph L. Shainwald's agents and employees, and did these acts under the direction of the said State Court of Nevada given in this very suit after its removal from said Court. The Sheriff in doing these acts deliberately and wantonly disregarded and disobeyed an injunction of the United States District Court of the State of California issued in a suit against said Sheriff in which he had duly and voluntarily appeared as a defendant. A copy of said injunction is annexed to the petition for removal and made a part of it. The Sheriff after committing these wrongful acts turned all of said property over to Joachimsen, the receiver appointed by said State Court in this action.

[The affidavits showing these facts have not been included in the Transcript on Appeal.]

(*l.*) None of the other defendants claim or pretend to have any right, title or interest in or to any of the money or property in the possession of said Ralph, or to have any interest whatever in said alleged partnership. They merely claim to be the owners of certain personal property purchased by them severally from said Ralph

(*m.*) The intervention of said Ralph was accomplished by and at the time of filing his petition of intervention, and it was incumbent upon the plaintiff and all parties to the suit claiming any interest adverse to said Ralph to have answered said petition as if the same was an *original complaint.*

1 Vol. Compiled Laws of Nevada, Sec. 1662.

Under the laws of Nevada the claims of the intervenors was to be determined at the time of trial.

Id., Sec. 1663.

It will hardly be contended, we think, that a party who has an interest in a matter involved in a suit, and

by reason of such interest is entitled to intervene, and is also by reason of his citizenship entitled to have the suit removed into the U. S. Court, can be lawfully prevented from or delayed in removing said suit until his rights have been seriously impaired or affected by some proceeding in said suit. Yet this would be the inevitable result in every suit where such right of intervention and removal existed, if the removal could not be effected until the intervention was allowed. The right given by the Act of Congress would then exist only in name.

It can hardly be doubted that Congress intended to give the right of removal without regard to any State Statutes in the cases prescribed in its several Acts. It has, therefore, been repeatedly held that this right of removal cannot be defeated by State legislation.

Insurance Co. vs. Morse, 20 Wall, 442.
Removal of Causes, Sec. 10, pp. 11–12, and cases cited.

The right of removal existed and was exercised and perfected immediately upon the filing of the petition and bond, and the approval of the bond on the 18th day after it was filed, was a recognition of the exercise of the right of intervention and removal.

The approval or disapproval of the petition for intervention should not be suffered to effect the right of removal.

Dillon's Removal of Causes (2d Ed.); notes on pp. 34–35.

AUTHORITIES.

(*a.*) If the controversy is one in which there can be a final determination between the plaintiff and the defendant, Ralph L. Shainwald—if it is so divisible that the controversy so far as concerns said Ralph L. Shainwald can be finally determined as between him and the plaintiff, then the said Shainwald is entitled to the removal of the cause under

Sec. 639, 103 U. S. R., pp. 205, 212.

Yulee vs. Vose, 99 U. S. R., 539, 544, 546. (A suit in which a joint trustee of a franchise and joint endorser of promissory note was held entitled to removal.)

Goodenough vs. Warren et al., 5 Sawyer, 494–8. (Tenancy in common between defendants. *Held*, that grantor of defendant was not a necessary party.)

Arapahoe County vs. Kansas Pac. R. W. Co., 4 Dillon, 285, 286. (Held, under Act of 1875, that the Court would treat the defendants as plaintiffs, if their interests were similar to those of the plaintiff. A suit for an accounting against defendants, who are interested in the accounting, and one of them is a citizen of the State in which suit is brought by citizens of that State.)

Turner Bros. vs. Indianapolis, B. & W. R. R. Co., *supra*. (Creditors' claim to surplus held to be a mere incident.)

Osgood vs. Chicago, D. & V. R. R. Co., 6 Bissell, 334. (Held, "that the fact that there are various judgment creditors whose rights are subject to the prior liens of bondholders, cannot affect the power of removal, their rights remaining unchanged." Nor can the fact that the judgment creditors have filed a cross-bill.)

City of Chicago vs. Gage, 6 Bissell, 467–473, (1875.) (Suit by beneficiary against trustee and trustor, for sale of trust property; judgment creditor of trustor becomes party defendant, and sets up that his rights to trust property are superior to those of the beneficiary, &c. The trustee joins with the beneficiary in asking the relief. Held, that the real and substantial controversy was between the other parties, although the judgment crediter might become interested by reason of his judgment against the trustor.)

Girardey v. Moore, et al., 5 Cent. L. J., pp. 78, 79, (1877.)

In Girardey vs. Moore, et al., *supra*, Justice Bradley held that there was no conflict between the Act of March 3d, 1875, and the act of July 27th, 1866, (same as Sec. 639, U. S. Rev. Stat.), and that the former Act

does not repeal the provisions of the latter, also, that one of several defendants is entitled, under the Act of 1866, to remove the case as to him to the Federal Court, if there can be a final determination to the controversy, so far as he is concerned, without the presence of the other dnfendants as parties in the cause; also, that one defendant could remove the cause, even when the bill would have been demurrable for want of parties, if the other defendants had not been made parties dedefendant: "that the other defendants would have been proper parties, but I think they would not have been necessary parties to the suit."

5 Central L. Journal, p. 80, (1877.) (The removal of the cause as to one defendant sustained.

In Wormser vs. Dahlman (The Reporter, Vol. VII, pp. 740–741), a decision of Judge Blatchford, rendered May 14 1879, the opinion of Justice Bradley in Girardy vs. Moore, *et al.*, is cited as the correct view of the law. Judge Blatchford held in this case that a suit against three partners to recover on a copartnership liability on two promissory notes made by the three partners as partners was properly removed into the U. S. Court by one of said defendants under Sub. 2 of said Sec. 639, U. S. Rev. Stat., and denied the application to remand. Judge Blatchford says: "It is also contended for the plaintifls that this suit is not one in which there can be a fina determination of the controversy so far as it concerns Dahlman without the presence of the other defendants sued with him as copartners as parties in the cause. The view urged is that as the three are sued as copartners no recovery can be had against Dahlman unless the copartnership shall be established, and that in such event the determination must be against the three. The language of Subdivision 2 of Section 639 is not that the suit must be one in which there can be a final determination of the whole controversy instituted by the plaintiff, as regards all the defendants, without the presence of all, but is only that the suit must be one in which there can be a final determination of the controversy, so far as concerns the defendant petitioning for removal, without the presence of the other defendants as parties in the cause.

In Taylor et al. vs. Rockafeller et al., decided June 17, 1878, Justice Strong not only sustains the opinions of Justice Bradley and Judge Blatchford in the two cases above cited, but goes farther than either of them, and holds that in a suit where the defendants are the trustees and the beneficiaries of a certain trust and some of them partners with the plaintiff in the subject matter involved in the suit, the cause may be removed by the defendants who are trustees. Justice Strong says: "The clause, 'a controversy which can be fully determined as between them,' in connection with 'actually interested in such controversy,' implies that there can be other, even necessary parties to the suit not entitled to remove it. Such other party must be indispensable to a determination of that controversy which is wholly between the citizens of different states, or their being parties to the action is no obstacle to the removal of the case to the Circuit Court. * * * Beyond a doubt the petitioners are the main defendants. There are no other indispensable defendants. If those who have not petitioned have any interest it is because the petitioners are the trustees, a matter in which the plaintiffs have no interest. Even if *cestui que trustent* the other defendants are not necessary parties, being represented by their trustees. * * The case plainly involves a controversy wholly between the plaintiffs and petitioners, which can be fully determined as between them. If there are other controversies in which other defendants are interested they are merely incidental. * * Indeed, according to the literal reading the right exists through the controversy between the plaintiff and defendant be not the main controversy. It is enough if there be a controversy wholly between citizens of different states which can be fully determined as between them, though it may not be fully determined as between the plaintiff and other defendants. The phrase, 'as between them,' is significant." Held also that on the motion to remand no fact can be traversed.

Taylor et al. vs. Rockafeller et al., The Reporter, Vol. 6, pp. 226–229.

The views expressed by Justice Strong in Taylor vs. Rockafeller, *supra*, have been approved by the Supreme Court of the United States in

Barney vs. Latham, 103 U. S. R., 205–216.

If there is, as we claim, such a real and substantial controversy between the said Ralph and the plaintiff, then the said Ralph cannot be deprived by this form of suit of any right to a removal which he would have had if a separate and distinct action or suit had been brought against him to determine said controversy.

Barney vs. Latham, 103 U. S., 213–214, 1880
also, p. 210 as to Act of 1866.
Cooke vs. State National Bank of Boston, 52 N. Y., 113 (1873).

The Court say: "It would be unjust to deprive one party of the right of removing his suit, because another action against other parties was allowed to be united in the same suit." (p, 113.)

It can hardly be necessary to discuss the question as to who would be the only necessary parties to the suit for the recovery of the possesion of the property in the hands of said Ralph; that the alleged creditors of said pretended partnership are not necsssary parties to such a suit is, we think, obvious.

AGAIN: Nominal parties, or persons made parties who are not necessary to determination of the real controversy (in this suit for the possession of said property), will not defeat the right to a removal.

Mayor, etc. vs. Cummins, 47 Ga., 321, (1872).
Dillon on Removal of Causes, Sec. 15, p. 16 (3d Ed.), and cases cited in Note 3.

A party must be indispensable, and not merely a proper party to the suit, in order to affect the question of the right of another party to the suit to a removal thereof.

Barney vs. Latham, 103 U. S., 214–215.

How can it be pretended seriously that Colman or any creditors of said alleged firm are even proper parties to such a suit.

AGAIN: If there are several controversies involved in one suit, the cause may be removed into the U. S. Court, provided, that any one of said controversies is between citizens of different states, and is such as may be capable of being finally determined as between them, without the presence of the other parties to the suit.

Barney vs. Latham, 103 U. S., 215-216.
Blake vs. McKim, 103 U. S., 337-338.

In Blake vs. McKim, supra, the U. S. Supreme Courts say: "In Barney vs. Latham (supra, p. 205) we held, construing the second clause of that section, that one or more of the plaintiffs or defendants, actually interested in a controversy wholly between citizens of different States, and which can be fully determined as between them, can remove from the State Court the entire suit of which the separable controversy forms a part, provided it involves the amount prescribed as necessary to Federal jurisdiction." 103, U. S. pp. 337-338.

In Barney vs. Latham, supra, the Supreme Court say: (p. 213, bottom.) "But the suit as distinctly presents another and entirely separate controversy, as to the right of the plaintiffs against the individual defendants for such sum as shall be found upon an accounting, to be due upon sales prior to the conveyance from the railroad company. With that controversy the land company, as a corporation, has no necessary connection. It can be fully determined as between the parties actually interested in it without the presence of that company as a party in the cause. Had the present suit sought no other relief than such a decree, it could not be pretended that the corporation would have been a necessary or indispensable party to that issue. Such a controversy does not cease to be one wholly between the plaintiffs and those defendants because the former, for their own convenience, choose to embody in their complaint a distinct controversy between themselves and the land company. * * * It may be suggested that if the complaint has united causes of action, which, under the settled rules of pleading, need not, or should not, have been united in one suit, the removal ought not to carry into the Federal Court any controversy except that which is wholly between citizens of different states, leaving for the determination of the state court the controversy between the plaintiffs and the land company. We have endeavored to show that the land company was not an indispensable party to the controversy between the plaintiffs and the defendants,

citizens of New York, Wisconsin, and Massachusetts. Whether those defendants and the land company were not proper parties to the suit we do not now decide. * * * A defendant may be a proper but not an indispensable party to the relief asked. In a variety of cases it is in the discretion of the plaintiff as to whom he will join as defendants. Consistently with established rules of pleading he may be governed often by considerations of mere convenience, and it may be that there was, or is, such a connection between the various transactions set out in the complaint as to make all of the defendants proper parties to the suit, and to every controversy embraced in it, at least, in such a sense as to protect the complaint against a demurrer upon the ground of multifariousness or misjoinder." (103, U. S. 212–216. 103, U. S. p. 214. 103, U. S. p.215.)

The Court, after declaring that multifariousness in a pleading, or what constitutes it, cannot be laid down by any definite rule; and that, as no objection was taken by demurrer, plea, or answer to the complaint, on the grounds of multifariousness or misjoinder, such objections must be deemed to have been waived, and citing authorities in support thereof, proceeds as follows. 103 U. S. 215.

"No objection was made by the defendants in the Court below to the complaint upon the ground of multifariousness or misjoinder, and the plaintiffs should not be heard to make it for the purpose, or with the effect, of defeating the right of removal. They are not in any position to say that that right does not exist, because they have made defendants those who were not proper parties to the entire relief asked. The fault, if any, in pleading was theirs. Under their mode of pleading, whether adopted with or without a purpose to affect the right of re- moval accorded by the statute, the suit presents two controversies, one of which is wholly between individual citizens of different States, and can be fully determined without the presence of the other party defendant. 103 U. S. 215, 216.

"The right of removal, if claimed, in the mode prescribed by the statute, depends upon the case disclosed by the pleadings as they stand, when the petition for removal is filed. The State Court ought not to dis-

regard the petition, upon the ground that, in its opinion, the plaintiffs, against whom a removal is sought, had united causes of action which should or might have been asserted in separate suits. Those are matters more properly for the determination of the trial Court—that is, the Federal Court—after the cause is there docketed. If that Court should be of the opinion that the suit is obnoxious to the objection of multifariousness or misjoinder, and for that reason should require the pleadings to be reformed, both as to subject matter and as to parties, according to the rules and practice which obtain in the Courts of the United States, and if, when that is done, the cause does not really and substantially involve a dispute or controversy within the jurisdiction of that Court, it can, under the fifth section of the Act of 1875, dismiss the suit, or remand it to the State Court, as justice requires. We are of opinion that, upon the filing of the petition and bond by the individual defendants in the separate controversy between them and the plaintiffs, the entire suit, although all the defendants may have been proper parties thereto, was removed to the Circuit Court of the United States, and that the order remanding it to the State Court was erroneous. 103 U. S. p. 216.

In this same case, the Supreme Court also say: (p. 212) "We may remark that with the policy of the act of 1875 we have nothing to do. Our duty is to give effect to the will of the law making power when expressed within the limits of the Constitution. We are of opinion that the intention of Congress, by the clause (Second clause of Sec. 2 of Act of 1875) under consideration, was not only to preserve some of the substantial features or principles of the Act of 1866, but to make radical changes in the law regulating the removal of causes from State Courts. One difference between that act and the second clause of the second section of the act of 1875 is, that whereas the former accorded the right of removal to the defendants who were citizens of a State other than that one in which the suit was brought,—if between them and the plaintiff or plaintiffs there was, in the suit, a controversy finally determinable as between them, without the presence of their co-defendant, or any of them, citizens of the same

State with the plaintiffs,—the latter gave such right to any one or more of the plaintiffs or defendants actually interested in such separate controversy. Both acts alike recognized the fact that a suit might, consistently with the rules of pleading, embrace several distinct controversies. But while the act of 1866, in express terms authorized the removal only of the separable controversies between the plaintiff and the defendant or defendants seeking such removal—leaving the remainder of the suit at the election of the plaintiff in the State Court,—the act of 1875 provides, in that class of cases, for the removal of the entire suit. That such was the intention of Congress is a proposition which seems too obvious to require enforcement by argument. While the act of 1866 expressly confines the removal to that part of the suit which specially relates to or concerns the defendant seeking the removal, there is nothing whatever in the act of 1875 justifying the conclusion that Congress intend to leave any part of a suit in a State Court where the right of removal was given to, and was exercised by, any of the parties to a separable controversy therein. * * * It was often convenient to embrace in one suit all the controversies which were so far connected by their circumstances as to make all who sue, or are sued, proper though not indispensable parties. Rather than split up such a suit between courts of different jurisdictions, Congress determined that the removal of the separable controversy to which the judicial power of the United States was, by the Constitution expresly extended, should operate to confer the whole suit to the Federal Court." 103 U. S., p. 212. 103 U. S., p. 213, top.

The Court states that the parties entitled to the removal had an interest in the ultimate disposition of the other controversy between the citizens of the State in which the suit was brought, but held that that circumstance did not defeat the right of removal. 103 U. S., p. 213.

It is respectfully submitted that the decision of the Supreme Court in Barney vs. Williams, supra, has decided and settled the following propositions, to-wit:

1. That where there are several controversies united in one suit, and any one of those controversies is such

that it can be fully determined between some of the parties to the suit without the presence of the other parties to the other controversies, and the parties plaintiff are citizens of different states from those of which the indispensable defendants or defendant to any one controversy are citizens, or is a citizen, then the entire suit is removable into the U. S. Circuit under the second clause of section two of the Act of 1875, upon the petition of any one or more of the plaintiffs or defendants actually interested in such separable controversy.

2. That the same right of removal existed under the Act of 1866, in like cases of separable causes of action united in one suit, but could only be exercised by the indispensable defendant or defendants to the separable controversy, who were citizens of different states from the plaintiffs, but that the removal then under said Act of 1866 only removed the separable controversy, provided the plaintiff elected to proceed in the State court as to the other controversies.

3. That the right of removal given by the Acts of Congress cannot be suffered to be defeated by the uniting of two or more controversies in one suit, or by the joining or naming of persons as defendants in a suit who are not indispensable parties to any of the causes of action included in said suit which is separable from the other causes of action, and by reason of the citizenship of parties thereto removable under any Act of Congress.

4. That the uniting in one suit of causes of action which may be properly joined, and the making of persons parties to said suit who are interested in the result of all of the controversies involved therein—and although such union of causes of action and joinder of defendants may be good against a demurrer for multifariousness and for misjoinder—will not and cannot be suffered to defeat the removal of the entire suit, if any one of the controversies so united is separable and as between citizens of different states and the other parties, though interested therein, and proper parties thereto, are not indispensable and absolutely necessary to the full determination of said separable controversy, and although the parties to the separable controversy entitled to the removal are interested in the other controversies involved in said suit.

5. That the right of removal under the first clause of Section 2 of the Act of March 3d, 1875, extended to cases where the parties to the suit, when the parties had been arranged upon the respective sides of the matter in dispute, were citizens of different states from those on the other side of the dispute, and that the suit was then removable under said first clause, provided all of the persons when so arranged on one side united in the petition for removal.

[This same point was so decided in the Removal Cases, 100 U. S. pp. 457–482.]

6. That the provisions of both of said clauses of Section 2 of the Act of 1875, as construed in Barney vs. Latham, are "within the limits of the Constitution" of the United States.

7. That it was the intention of Congress by the Act of 1875 to extend and enlarge the cases wherein causes might be removed from the State Courts.

8. That the right of removal, if claimed, depends upon the case disclosed by the pleadings and petition as they stand when the petition for removal is filed.

9. That the removal takes place absolutely when the petition and bond are filed, and the State Court cannot disregard the petition and proceed with the action or suit.

10. That the United States Circuit Court, to which a cause involving several controversies is removed, has the authority to order that the pleadings be reformed, both as to the subject matter and the parties, according to the rules and practice which obtain in the courts of the United States, and when the pleading are so reformed, if the cause does not really and substantially involve any dispute or controversy within the jurisdiction of that Court, it can, under the fifth section of the Act of 1875, dismiss the suit, or remand it to the State Court, as justice may require.

If we are not mistaken in our construction of the decision in the case of Barney vs. Latham, there can be little question or doubt in the mind of this Court, we believe, that it disposes of all of the propositions of law made or involved, on the motion to remand.

If this view be well taken, then it can be only a question of application of settled principles to the facts in-

volved in the present suit; of an examination and construction of the pleadings on file at the time of the filing of the petition for removal, and also of said petition for removal, to ascertain and determine whether there is more than one controversy involved in this suit and, if so, how many controversies, and between what indispensable parties each controversy exists, and whether any of said several controversies, if there be several, is separable from the others, and is between citizens of different States; and finally, whether a petition has been filed by any one or more of the parties plaintiff or defendant, to the separable cause of action between citizens of different States.

All of these questions have been fully argued by us, and it has been demonstrated, we hope and believe, that there are many distinct and and radically different controversies involved in this suit and averred in the complaint—that each and every one of those numerous controversies is not only distinct, but separable from every other controversy in the suit—that the necessary and indispensable parties to each of said controversies are different persons; that the principal controversy, that is, the one for the possession of most of the property mentioned in the complaint, is wholly between the plaintiff, a citizen of the State of Nevada, and Ralph L. Shainwald, a citizen of the State of California; that the controversy between the plaintiff and said Ralph is a real, substantial controversy about the title to and possession of personal property of the value of more than $20,000, of which said Ralph was in the the actual and peaceable posseision at the time of the removal of this suit into the Circuit Court; and that a petition for the removal in due form, averring all the necessary facts, and duly verified, with the statutory bond, was duly filed in the State Court, the bond being approved by the Judge of the State Court.

Hyde vs Ruble, 104 U. S. pp. 407, 409, reaffirms the doctrines laid down by this Court in Barney vs. Williams.

That suit (Hyde vs. Ruble) differs from the one now before this Court in many very material points. That suit sounded in *contract*, while this sounds in *tort;* that suit was upon a joint contract, while this is to recover

possession of personal property alleged to have been wrongfully and unlawfully taken and detained; in that suit the allegations as to conversion were immaterial and redundant, as there was a contract of bailment averred and relied upon, while in this suit no contract being averred or relied upon, the allegations as to wrongful taking, detention and conversion are material and essential to the plaintiff's cause of action; in that suit the plaintiff does not, by the averment of a partnership between himself and one of the defendants, and by applying for a dissolution thereof, seek to recover the possession of personal property held by other persons adversely to him and to the alleged partnership, while in this suit the plaintiff does seek to do that; in that suit the defendants were all alleged to be *jointly* liable upon a contract of bailment, while in this it is not alleged that any of the defendants joined or acted in concert with Ralph L. Shainwald in the tortious acts averred to have been committed by him or his agent Crittenden in the taking and conversion of said personal property; in that suit the recovery of a certain sum of money was sought from *all* of the defendants as *jointly* liable, while in this suit the plaintiff seeks to recover *different* personal property from *each* of the defendants.

The action of Hyde vs. Ruble differing so radically from the one now before the Court—and that, too, in those very matters and particulars which are stated as the grounds and reasons for the decision of the Court in that same case—it cannot, we think be regarded as an authority against the appellants.

We claim, on the contrary, that the decision in Hyde vs. Ruble sustains the propositions contended for by appeallants—that it affirms all the rules declared by this Court in Barney vs. Latham—that it holds that there is a difference as to the removal of causes between a suit sounding in *contract* and one sounding in *tort*—that the question of *partnership* even in a suit sounding in *contract* is *not* the *real controversy*, even where the partnership is averred to have been a partnership of *all* the defendants, and the contract sued on alleged to be a partnership liability—that if said suit of Hyde vs. Ruble had sounded in *tort* instead of *contract*, the removal of the cause would have been sustained.

The order remanding this suit to the State Court should, we think, be reversed.

Respectfully submitted,

T. T. CRITTENDEN,
JAMES L. CRITTENDEN AND
FRANKLIN H. MACKEY.
Of Counsel for Appellants.

OFFICE SUPREME COURT U.S.
FILED
MAR 6 1883
JAMES H. McKENNEY, Clerk

108-158

SUPREME COURT OF THE UNITED STATES.

No. 976.

RALPH L. SHAINWALD, RECEIVER, &c., AND HERMAN SHAINWALD, ASSIGNEE, &c., INTERVENORS; J. A. WRIGHT, ISAAC HOFFMAN AND S. HOFFMAN, COMPOSING THE FIRM OF HOFFMAN BROTHERS, ET AL., APPELLANTS,

vs.

ISAAC J. LEWIS.

Brief and Points of Isaac J. Lewis,

DEFENDANT IN ERROR.

ALBERT BACH,

Counsel for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

No. 976.

RALPH L. SHAINWALD, Receiver, &c., and HERMAN SHAINWALD, Assignee, &c., intervenors; J. A. WRIGHT, ISAAC HOFFMAN and S. HOFFMAN, composing the firm of HOFFMAN BROS, *et al.*,

Appellants,

vs.

ISAAC J. LEWIS.

Brief and Points of Isaac J. Lewis, Defendant in Error and Appellee herein.

This is an appeal from an order of the United States Circuit Court, Ninth Judicial Circuit, for the District of Nevada, remanding to the District Court of the Fifth Judicial District in and for the County of Lander, State of Nevada, whence it had been removed to said United States Circuit Court, a cause in said State Court instituted by Isaac J. Lewis, defendant in error herein and plaintiff therein, against one Harris Lewis and one Abraham Coleman, defendants therein, and J. K. Wright, Isaac Hoffman and S. Hoffman, composing the firm of Hoffman Brothers, Joseph Huber, Charles Sadler, A. & M. Sower, R. Hogan, J. B. Pringle, Charles Polkinghorn, B. C. Thomas and James Brennan, appellants herein

and defendants therein, for a dissolution of a copartnership theretofore existing between said Isaac J. Lewis and said Harris Lewis, and a distribution of the firm assets among its creditors, &c., and to restrain the defendants therein, J. D. Pringle, B. C. Thomas and James Brennan, from selling or disposing of any of the goods of the said copartnership in the wrongful possession of which they are alleged in the complaint to be; and to compel them to deliver said goods to the Receiver whose appointment is sought by said suit, and to compel the above-named J. K. Wright, Hoffman Brothers, Joseph Huber. Charles Sadler, A. & M. Sower, R. Hogan and Charles Polkinghorn, to account for and pay over to said Receiver the value of certain goods of the said copartnership, which said last named persons and firms are in the complaint alleged to have taken and misappropriated to their use.

Vide Complaint, page 1, printed transcript of Record; and Order remanding, on p. 34, printed transcript of Record.

STATEMENT OF FACTS.

On or about the 1st day of January, 1880, the defendant in error herein, Isaac J. Lewis, and said Harris Lewis entered into a copartnership in trade in the general business of buying and selling merchandise, net profits to be divided share and share alike. Said business was to be and was, until interrupted as hereinafter set forth, carried on in a store occupied by said partners at Austin, in the State of Nevada.

Between the 1st day of January, 1880, and the 5th day of November, 1880, said *copartnership* contracted various indebtednesses for goods sold and delivered, and moneys loaned to and used in and for the purposes of the partnership business, and so sold and delivered and loaned by third parties to said copartnership's firm as such. These indebtednesses last aforesaid have never been paid, settled or discharged, and are still due and owing from said copartnership to Abraham Coleman, the Assignee and present owner of all the claims of the said copartnership creditors.

Prior to January 1st, 1880, Harris Lewis, one of the members of said co-partnership aforesaid, had become involved in certain pri-

vate and individual business complications, outside of and in no way connected with the business of said copartnership, and to which said complications defendant in error therein, the other member of said copartnership aforesaid, was, as is admitted by all the parties herein, an absolute stranger. From said complications resulted litigations involving said Harris Lewis, but not defendant in error herein, and said litigation on the 5th day of November, 1880, culminated in a personal judgment for $99,524.33 against said Harris Lewis, but not against defendant in error herein, and in favor of one Herman Shainwald as assignee in bankruptcy of the firm of Schoenfeld, Cohn & Co., and of Lewis S. Schoenfeld, Isaac Newman and Simon Cohn. The action in which said judgment was obtained as aforesaid, was between said Harris Lewis and said Shainwald as assignee, etc., as aforesaid, only, and was in the District Court of the United States for the District of California. Said Herman Shainwald is one of the intervenors herein. In said action last aforesaid, a Receiver of all the property of said Harris Lewis, the judgment debtor therein, was appointed by the Judge of the said United States District Court for the District of California, and said Harris Lewis was directed to make and made an assignment of all his personal and individual property to said Receiver. Said Receiver is Ralph L. Shainwald, the other intervenor in said action and one of the appellants herein.

Page 25, printed transcript of record.

Thereafter, in order to collect the amount of the judgment last aforesaid, said Herman Shainwald commenced an action against said Harris Lewis on said judgment, in the nature of a creditor's bill, in the United States District Court for the District of Nevada, and in this last action Ralph L. Shainwald was again appointed Receiver of the property of the individual Harris Lewis, on an exparte application and without notice. Immediately after his appointment as Receiver last aforesaid, and before any proceeding could be taken to have said appointment vacated, acting under authority of said appointment as such Receiver last aforesaid, said Ralph L. Shainwald gave to James Crittenden, who was his attorney-at-law in all the matters herein, and is his attorney on the appeal to this Court, power to act for him, said Ralph L. Shainwald, as such Receiver last aforesaid, and said Crittenden forcibly thereupon entered into the store occupied by said firm, which was under

the charge and supervision of defendant in error herein, and claiming to act under authority derived from said Ralph L. Shainwald as such Receiver last aforesaid, forcibly and by violence and with threats and the exhibition of deadly weapons drove the defendant in error out of said store, and he, said Crittenden, took possession thereof and seized upon all the merchandise, moneys, books and letters therein contained, claiming the same to be the property of the individual Harris Lewis, and shipped the said letters, books and coin out of the State of Nevada. All the said merchandise, letters and books in said store contained as aforesaid, was the property of the said copartnership composed of Isaac J. Lewis and Harris Lewis aforesaid. Part of said coin was the property of said copartnership, but the greater part of said coin belonged to third persons who had entrusted the same to defendant in error herein for safe keeping. Said Crittenden held possession of said store by force of arms, and although defendant in error essayed to enter the same several times, he was repelled and ejected therefrom by said Crittenden and his agents.

On or about the 11th day of December, 1880, on an application in that behalf made to the District Court of the United States for the District of Nevada, and after full argument pro and con, the order appointing said Ralph L. Shainwald Receiver was vacated and said Receiver was discharged. Thereafter said Ralph L. Shainwald and all his agents, employees and representatives then in unlawful possession of said firm's store and effects and assets were served with a copy of said order vacating the appointment of and discharging said Ralph L. Shainwald as Receiver last aforesaid. But disregarding said order, said Shainwald and his employees, agents and representatives aforesaid, refused to deliver up possession of said store or firm assets, and continued in possession thereof by force of arms, and proceeded to advertise all the merchandise and effects belonging to said copartnership for sale, claiming them to be the property of the individual Harris Lewis. At the same time defendant in error herein advertised cautions against purchasing at said sale, claiming that the property was copartnership property belonging to the partnership of which he and Harris Lewis were the members as aforesaid, and not the property of the individual Harris Lewis.

After service of the order vacating the appointment of Ralph L. Shainwald as Receiver last as aforesaid, Herman Shainwald, as assignee as aforesaid, commenced another action against said

Harris Lewis on his judgment as assignee as aforesaid against said Harris Lewis in the District Court for the Fifth Judical District for the State of Nevada, in and for the County of Lander, and caused an attachment to issue therein and directed the Sheriff of said County of Lander, B. C. Thomas, one of the appellants herein, to levy on the very same property of which said Ralph L. Shainwald was wrongfully in possession as aforesaid, as the property of said individual Harris Lewis, which said Sheriff did.

That thereafter said Ralph L. Shainwald, without authority or right of law, proceeded to sell, and pretended to sell, the interest of said Harris Lewis in a large portion of said merchandise, and delivered the possession thereof to sundry persons, who are parties appellants herein, who thereby falsely claim to have become seized of the interest of said Harris Lewis therein. In consequence of the advertised cautions and notices given by the defendant in error, as aforesaid, and the uncertainty as to the title of said Receiver Shainwald to said merchandise, and his right to sell the same, said merchandise brought only from fifteen to thirty-three per cent. of its market value, greatly to the injury of the joint and firm creditors of said co-partnership. After said sale, said Ralph L. Shainwald threatened to sell the rest of said goods, and by reason of all the above facts, it became impossible to proceed with the business of said co-partnership, and hence the necessity of this suit for dissolution, etc., aforesaid.

Vide Complaint, page 1, Printed Transcript of Record.

On the 17th day of January, 1881, a Receiver was appointed in the suit for dissolution of partnership, aforesaid, and the parties so wrongfully in possession of said store and assets, as aforesaid, namely, the Sheriff, B. C. Thomas, Pringle and Brennan, were directed to hand over all the said property in their hands to said Receiver of said partnership assets.

Vide page 11, Printed Transcript of Record.

Even after service of said order on them, said parties, B. C. Thomas and J. D. Pringle, refused to deliver up possession of said property to said firm Receiver until they were again directed so to do by order of the State Court, in which this suit is pending, made on the 26th day of January, 1881, and after they and each of them had been adjudged guilty of contempt for not having so done.

Vide page 18, Printed Transcript of Record.

ARGUMENT.

The question to be determined on the appeal herein is, WAS THIS CAUSE, ON THE FACTS AS THEY APPEAR FROM THE PLEADINGS, PETITION FOR REMOVAL AND PROCEEDINGS THEREIN, PROPERLY REMOVABLE TO THE UNITED STATES CIRCUIT COURT, UNDER THE PROVISIONS OF THE ACT OF CONGRESS OF MARCH 3, 1875, ENTITLED "AN ACT TO DETERMINE THE "JURISDICTION OF CIRCUIT COURTS OF THE UNITED STATES AND TO "REGULATE THE REMOVAL OF CAUSES FROM STATE COURTS AND FOR "OTHER PURPOSES?

It is claimed and contended by defendant in error and appellee herein, Isaac J. Lewis, that this cause was not removable to the United States Circuit Court under the provisions of said act; that the removal thereof was error; that the order remanding the same was, in every respect proper and correct; and there are not any grounds herein for a reversal of the same.

The second section of the Act of Congress of March 3, 1875, aforesaid, is the law controlling the removal of causes from State Courts to the United States Circuit Courts. This section consists of two clauses:

First.—"That any suit of a civil nature, at law or in equity, now "pending or hereafter brought in any State Court, where the matter "in dispute exceeds, exclusive of costs, the sum or value of five "hundred dollars * * * in which there shall be a controversy "between citizens of different States * * * either party may "remove said suit into the Circuit Court of the United States for "the proper district."

Second.—"And when in any suit mentioned in this section there "shall be a controversy which is wholly between citizens of different "States and which can be fully determined as between them, then "either one or more of the plaintiffs or defendants actually inter-"ested in such controversy may remove said suit into the Circuit "Court of the United States for the proper district."

The said first clause was construed in Meyer vs. The Construction Company (100 U. S. Reports, 468) to mean "that when the "controversy about which the suit in the State Court is brought is "between citizens of one or more States on one side, and citizens "of other States on the other side, either party to the controversy

" may remove the suit to the Circuit Court without regard to the " position they occupy in the pleadings as plaintiffs or defendants. " For the purpose of the removal the matter in dispute may be " ascertained and the parties to the suit ranged on opposite sides " of the dispute. If on such arrangement it appears that those on " one side are all citizens of different States from those on the " other, the suit may be removed. Under the old law the pleadings " only were looked at and the rights of the parties in respect to the " removal were determined solely according to the position they " occupied as plaintiffs or defendants in the suit, (*Coal Co. vs.* " *Blatchford*, 11 *Wall*, 174). Under the new law the mere form of " pleadings may be put aside and the parties placed on different " sides of the matter in dispute according to the facts. This being " done, when all those on one side desire a removal it may be had " if the necessary citizenship exists."

Under this construction if there is one party on one side of the controversy of the same State with one party on the other side, the cause cannot be removed.

The second clause of the above section was construed in *Barney vs. Latham*, 103, *U. S. Reports*, 205, as meaning: " That one or " more of the plaintiffs or defendants actually interested in a con- " troversy wholly between citizens of different States, and which " can be fully determined as between them, can remove from the " State Court the entire suit of which that separable controversy " forms a part, provided it involves the amount prescribed as " necessary to Federal jurisdiction."

In Blake vs. McKim, 103 *U. S. Reports*, 339, it is held that if there be an indispensable party plaintiff or defendant on the side seeking the removal who is a citizen of the same State with one or more of the plaintiffs or defendants against whom the removal is asked, there can be no removal. In the language of the learned Judge rendering the opinion of the Court in *Blake vs. McKim*: " It is to " be presumed that Congress in enacting the statute of 1875 had in " view as well the previous enactments regulating the removal of " causes from the State Courts as the decisions of this Court upon " them. If it was thereby intended to invest the Circuit Courts " with jurisdiction of all controversies between citizens of different " States, although others might be indispensable parties thereto, " such intention would have been expressed in more explicit lan-

"guage. We are of opinion that Congress, in determining the "jurisdiction of the Circuit Court over controversies between citi- "zens of different States, has not distinctly provided for the "removal from the State Court of a suit in which there is a con- "troversy not wholly between citizens of different States and to the "full or final determination of which one of the indispensable parties "plaintiff or defendant on the side seeking the removal is a citizen "of the same State with one or more of the plaintiffs or defendants "against whom the removal is asked."

In *Hyde vs. Ruble*, 104 *U. S. Reports*, 407, it is held that under the second section of the Act of March 3, 1875, aforesaid, a suit cannot be removed from a State Court to the United States Circuit Court unless either all the parties on the one side of the controversy are citizens of different States from those on the other side, or there is in such suit a separable controversy wholly between some of the parties who are citizens of different States, which can be fully determined as between them.

Having thus stated the law on the subject and the construction of it by the Supreme Court of the United States, we shall proceed to apply it to the case at bar.

The grounds for removal of this cause, claimed in the petition for removal to exist, are:

1st. That the matter in dispute in this suit exceeds the sum of five hundred dollars exclusive of costs.

2nd. That *the controversy herein* is between a citizen of the State of Nevada and citizens of the State of California, namely: I. J. Lewis, defendant in error herein, and Ralph L. and H. Shainwald, appellants herein.

3rd. That *the matter in controversy* in said suit can be wholly settled and determined between the parties thereto in the Circuit Court of the United States in and for the District of Nevada.

It is admitted in said petition that the defendants, Wright, Hoffman, Huber, Sadler, A. and M. Sower, Hogan, Polkinghorn, B. C. Thomas, J. D. Pringle and J. Brennan, are nominal defendants in said action, and have no interest therein.

And it is also admitted by said petition that the rights of all the last above-named defendants are entirely governed by and dependent on and to be settled by the determination of the rights of Herman Shainwald as assignee, etc., and Ralph L. Shainwald as Receiver, etc.

THE ORDER OF REMOVAL STATES, AS THE REASON FOR THE REMOVAL, THE FOLLOWING:

"It is declared that it is made to appear to the satisfaction of " this Court that the present suit is commenced in this Court by a " citizen of the State of Nevada against citizens of the State " of California, and that the matter can be fully and wholly deter- " mined between them in said United States Circuit Court for- " the District of Nevada, and that the matter in dispute exceeds " $500, exclusive of costs."

POINT I.

THE GROUNDS FOR REMOVAL, AS SET FORTH IN THE PETITION AFORESAID, AND THE REASON FOR REMOVAL SET FORTH IN THE ORDER OF REMOVAL AFORESAID, ARE THE ONLY ONES ON WHICH APPELLANTS HEREIN CAN RELY. THEY CANNOT INVOKE THE AID OF ANY GROUNDS FOR REMOVAL—IF ANY THERE BE—OTHER THAN THOSE AFORESAID.

POINT II.

UNDER THE PETITION FOR REMOVAL AFORESAID, THE QUESTION WHETHER THIS CAUSE IS REMOVABLE TO THE UNITED STATES CIRCUIT COURT, IS TO BE DETERMINED BY THE PROVISIONS OF THE FIRST CLAUSE OF SAID SECOND SECTION OF THE ACT OF 1875 AFORESAID, AND NOT BY THE PROVISIONS OF THE SECOND CLAUSE OF SAID SECTION.

It is claimed that *the* controversy herein is between citizens of different States and that *the* matter in controversy herein can be wholly settled and determined between the parties thereto in the United States Circuit Court in and for the District of Nevada.

It is not claimed in said petition, nor is it stated in the order of removal, that there is more than one controversy between the different parties, one of which controversies is separable from the others, and is wholly between citizens of different States, and can be fully determined as to them in the United States Circuit Court.

POINT III.

THIS CAUSE IS NOT REMOVABLE UNDER THE PROVISIONS OF THE FIRST CLAUSE OF SAID SECOND SECTION OF SAID ACT OF 1875 AFORESAID. THE REMOVAL WAS ERROR, AND THE ORDER REMANDING IS CORRECT AND PROPER.

The grounds for removal as set forth in said first clause do not exist herein.

It appears upon the face of the complaint, answer and petition for intervention herein, that when there is a classification of the respective parties herein in accordance with their respective interests and rights, *the* subject matter in dispute, *the* controversy herein, is not between parties of different States.

What is the *substantial* controversy, the *real* litigation, the *substantial issue* in this suit, and between whom is it?

We assert it is as to the *priority of payments out of the assets now in Court, and in the complaint described, of the claim of Herman Shainwald, as assignee, &c., the judgment creditor of the individual Harris Lewis, and the claim of Abraham Coleman, the assignee of the claims of the creditors of the firm of which said Harris Lewis and Isaac J. Lewis, the defendant in error herein, constitute the members.*

If this is true, the real controversy, the substantial issue and litigation herein, it will be seen, is wholly between said *Herman and Ralph L. Shainwald on the one side and Abraham Coleman on the other side, who are all citizens of the same State,* namely, the State of California.

The Shainwalds claim all the assets and property described in the complaint herein, as the property of the individual Harris Lewis in satisfaction of Herman Shainwald's judgment as assignee against said Harris Lewis.

Abraham Coleman bases his right of priority of payment out of the property and assets, on the ground that said property and assets belong to the copartnership alleged in the complaint to exist between Isaac J. Lewis and said Harris Lewis (and this, said defendant, Harris Lewis, does not deny), and as such should be first applied to the payment of the claims of the creditors of said

copartnership, which claims are unpaid, unsettled and undischarged, and of which he, said Coleman, is the assignee and absolute owner.

Now let us see whether the pleadings herein do not bear us out in our assertion as to what *the subject in controversy, the real litigation, the actual issue herein, is, and as to who the parties thereto are.*

The complaint alleges:

First.—A *copartnership* between Isaac J. Lewis, defendant in error herein, and Harris Lewis, one of the parties defendant therein.

Second.—That at a certain time the *copartnership* purchased on credit and received at their said store various articles of merchandise of the value of about $20,000, from various merchants and firms carrying on business in the City and County of San Francisco, State of California, and that the firm of which it is alleged said Isaac J. Lewis and Harris Lewis comprised the members, for the purpose of carrying on said business, borrowed money from Lazard Fre'res, bankers of San Francisco, California, and other parties in said City of San Francisco, State of California; and that all of said moneys were used in said business; and that all claims against said copartnership firm aforesaid for said goods sold and delivered and moneys loaned to said firm were duly, and for value transferred and assigned to the defendant, Abraham Coleman, who is the present owner of the same; that said claims have never been paid, settled or discharged.

The other allegations of said complaint are made merely to show a necessity of the dissolution of the partnership and distribution of its assets among its creditors in the first instance, by reason of the wrongful acts of the Shainwalds and their employees and representatives and those asserting rights and doing wrongs under cover of the alleged legality and strength of the claim of the Shainwalds, that the property and assets in question are the property and assets of the said *individual* Harris Lewis and not of the *partnership* aforesaid.

The answer of all the defendants who put in an answer, first attempts to show the legality of what in the complaint is alleged to be, and what by the orders of the Court in which this action was instituted, and which orders are to be found respectively on

pages 11 and 18 of the printed transcript of record herein, to show to be an illegal and tortious possession of the assets and property herein, and then denies,

First—The partnership as alleged in the complaint.

Second—That any business was carried on by the partnership as alleged in the complaint.

Third—That any goods were purchased by the partnership on a credit or received in the store of the partnership as alleged in the complaint.

And then said answer denies all the allegations in the complaint as to the tortious taking and holding of the assets and property as alleged in the complaint; founding all said denials of the said tortious taking and holding and misappropriation of the property aforesaid, on the title of the Shainwalds to said property and assets, as the property of the individual Harris Lewis and not the property of the alleged copartnership.

The petition for intervention of the the Shainwalds, which is in reality an answer to the complaint herein, alleges as a ground of intervention, that the petitioners therein named, being Herman Shainwald, assignee, &c., and Ralph L. Shainwald, Receiver, &c., have an interest in the matter in litigation, and an interest against both parties to said action; and as to the remaining portion, it is an exact verbatim copy of the answer aforesaid, except that it admits the denials of the allegations as to tortious acts of the other defendants as set forth in the complaint, and claims that Ralph L. Shainwald, as Receiver of the property of the individual Harris Lewis, is entitled to the possession of all the property and assets of the copartnership, claiming it is not copartnership property, but is the property of the individual Harris Lewis, and prays that petitioners may be allowed to resist the claim of plaintiff as to the property being copartnership assets, and that said Ralph L. Shainwald as such Receiver as aforesaid, be adjudged to have the rightful possession of said property and assets.

We claim and contend that the question of an actual copartnership *in fact* between Isaac J. Lewis, defendant in error herein, and said Harris Lewis, *cuts no figure in this case for the purposes of removal*, and is not one of the issues that can concern either of the

Shainwalds in the slightest degree. For whether said Isaac J. Lewis and Harris Lewis *were copartners between themselves in fact, does not limit their liability as such to third persons, for their public liability extends far beyond their private liability to each other, and may arise in contravention of their mutual intent and in cases where, between themselves, they would not be partners.*

Their liability as partners to third persons may arise in two ways: either by participation in the profits of the partnership or by holding themselves out as partners.

Story on Contracts, Section 205.
3 *Kent's Com., p.* 30, 31, *and cases cited.*

We maintain that the *creditors of said partnership firm*, composed of said Isaac J. Lewis and Harris Lewis aforesaid, who dealt with said firm *as such* upon the strength of the representations of the members thereof, that they were copartners, and who delivered their goods to them at the copartnership place of business, and loaned the said copartnership money for copartnership purposes on the faith of said representations, the said goods and moneys having been used for partnership purposes and in the partnership business, and the goods being the same goods as those mentioned in the complaint, the firm creditors are entitled to a priority in the payment of their respective claims out of the property, as against the personal creditors of the individual Harris Lewis, whether *in fact* a partnership existed or not as between said Isaac J. and said Harris Lewis.

Therefore, the question at issue is, not whether there was or not *in fact* a copartnership as between Isaac J. and Harris Lewis, for this wou'd not determine the rights of the Shainwalds in this action; for they, the Shainwalds, go further and ask to, and are allowed to intervene, not to disprove the existence in fact of a copartnership between Isaac J. and Harris Lewis, for this would not be a ground for intervention, but because they claim the property now in Court. But the real question at issue is, as we have stated it, who is entitled to priority of payment as aforesaid out of the firm's assets described in the complaint, and this question can surely not be determined to bind defendant *Abraham Coleman* in any suit between Isaac J. Lewis and the Shainwalds, even if it were decided that there was *in fact* no copartnership as between said Issac J. Lewis and Harris Lewis.

We apprehend that it will be at once, and at a glance, seen from the above that our assertion as to what is the real controversy, the real and substantial issue and litigation herein, and between whom it exists, is in every respect correct, namely, *who is entitled to priority of payment out of the assets now in Court and in the complaint described;* the creditors of the individual, Harris Lewis, or the creditors of the co-partnership firm of which said Isaac J. and Harris Lewis are the members; and as the creditor of the individual Harris Lewis is *Herman Shainwald*, as assignee aforesaid, and Ralph L. Shainwald is the Receiver for the benefit of said Herman Shainwald, and the co-partnership creditor is *Abraham Coleman*, the assignee of and owner of the claims of the co-partnership creditors, the real and substantial issue herein is purely and only between the said Shainwalds and Abraham Coleman, all of whom are residents of the *same State*, namely, California.

Thus it will be seen that *the real controversy* herein is not between citizens of *different States*, but that it is wholly between citizens of the *same State*, and this cause is not removable under the provisions of the first clause of said second section of said Act of 1875.

POINT IV.

THIS CAUSE IS NOT REMOVABLE UNDER THE PROVISIONS OF THE SECOND CLAUSE OF SAID SECOND SECTION OF SAID ACT OF 1875.

There is not in the suit at bar a separable controversy wholly between some of the parties who are citizens of different States which can be fully determined as between them in the United States Circuit Court.

Having, as we believe, shown in Point III what the real controvesry herein is, and between whom, and that this cause is not removable under the first clause of the second section of said Act of 1875, and whilst claiming that that governs the appeal herein, let us, nevertheless, for the sake of completeness of argument, determine whether there is any other controversy herein between citizens of different States, and which can be separated from the controversy above, and which can be fully determined in the United States Circuit Court between the parties to the separable controversy, if any there be.

And first let us see between whom there is any controversy herein.

There is certainly no controversy between Harris Lewis and defendant in error Isaac J. Lewis; nor between Abraham Coleman and said Isaac J. Lewis; nor between said Harris Lewis and said Abraham Coleman.

It is admitted in the petition for removal herein that the defendants, Wright, Hoffman Brothers, Huber, Sadler, A. & M. Sower, Hogan, Polkinghorn, B. C. Thomas, J. D. Pringle, and James Brennan, have no interest in this action, and that all their rights and liabilities are dependent on the rights and liabilities of the Shainwalds. Therefore, there is not any controversy wholly between said defendants and any other party hereto that can be wholly determined between them; nor could there be.

It became necessary, however, to make these parties defendants in this action for the following reason:

The complaint alleges that J. L. Crittenden, by force and intimidation, took possession of the assets of H. Lewis & Co., in the actual possession of I. J. Lewis, the plaintiff therein and defendant in error herein. Such taking and detaining we claim is unlawful.

Parker v. Browning, 8th Paige's Chancery Reports, pages 398 and 399.

Immediately after the taking of such possession by said Crittenden, Shainwald disposed of a large quantity of said goods, amounting to about fifteen thousand dollars, at great sacrifice, without warrant or authority of law or order of Court, and while said possession was held by an armed body of men.

Such disposition of said property being illegal, and the sale void, the parties receiving the same became, and are, liable to H. Lewis & Co. for the value of said goods, hence the necessity of joining such persons as parties defendants in this action, they being the persons who misappropriated said goods, as appears from the complaint herein.

Vide Complaint, page 3, Printed Transcript of Record.

There certainly is no controversey between any of the said last above-named defendants.

There certainly is no controversey between said defendants last above-named and said Shainwalds. There cannot be any controversey between the Shainwalds.

There is a controversy between the Shainwalds and said Harris Lewis, for he, said Harris Lewis, may question the judgment of Herman Shainwald aforesaid, and the assignment alleged to have been made and executed by him, and may claim part of the surplus of the assets after paying copartnership debts (if any there be) to him, said Harris Lewis, belonging.

But they are citizens of the *same State*, viz., California.

It was claimed in the Court below by appellants herein in opposition to the motion to remand, that there was a separable controversy between Ralph L. Shainwald, as Receiver, and defendant in error herein Isaac J. Lewis; first, as to whether there was in fact a partnership between Isaac J. Lewis and Harris Lewis; second, the right to the possession of the property described in the complaint herein, by said Shainwald.

And to this controversy, counsel for the parties opposing the motion to remand, claimed that Ralph L. Shainwald and Isaac J. Lewis were the only necessary parties. "For," remarked said counsel, "if "either of said issues is decided in favor of said Ralph L. Shainwald "he will hold all of said property *subject to the direction of the Court* "*appointing him Receiver, and Coleman and any other persons* "*claiming any right to share in the proceeds of said property would* "*then have to apply to the United States District Court for Cali-* "*fornia for relief.*"

Said Counsel further claimed that the question as to whether the defendant in error herein, Isaac J. Lewis, was ever a partner in said business with Harris Lewis, is certainly one wholly between the plaintiff and the person who had succeeded by assignment and by an order of the Court (meaning the order of the United States District Court for the District of California) to all of Harris Lewis' title to and interest in said business.

Before answering the claims of said Counsel we would beg leave to state that said Ralph L. Shainwald never was, nor is he now, entitled to the possession of the property or assets in the complaint described, conceding even the claim that he took the same in his capacity of Receiver of the property of Harris Lewis, by

virtue of his appointment as such by the District Court of the United States for the District of California (which we deny), for the reason that the Receiver cannot take property outside of the jurisdiction of the Court appointing him, even if the order for the Receiver had distinctly stated on the face of it over what property the Receiver was appointed.

Prow vs. Woods, 13 *Beavan's Reports*, 273.

And now to answer the above claims of Counsel for appellants herein:

It is clear from the statement of his first claim last aforesaid that there cannot be a *final* determination of the alleged controversy as to said Ralph L. Shainwald, or as to anybody else, without the presence of *Coleman* and *the other* defendants. And is it not equally clear from what we have herein before shown, that the rights of said *Coleman* are adverse to said Shainwald in this action; and that therefore the controversy is between citizens of the *same State*, the Shainwalds and Coleman being all citizens of the State of California. In fact, there cannot be a final determination of the controversy as to the Shainwalds or anybody else, indeed nothing could or would be finally decided in this suit as to a portion of the defendants, without *Abraham Coleman;* for suppose Coleman had not been a party to the suit, would not he have the right to intervene in this action and assert his prior lien as a judgment creditor of the copartnership of which said Isaac J. and Harris Lewis were members as aforesaid, upon the property in litigation, and would not then a controversy at once arise between the Shainwalds and all others claiming a prior right thereto or better title to the same?

And as to the second claim of the counsel for appellant above mentioned, to the effect that as Ralph L. Shainwald had succeeded by assignment by order of Court, to all Harris Lewis' title to and interest in said business, the question whether there was a partnership between Isaac J. Lewis and Harris Lewis was one solely between said Ralph L. Shainwald as Receiver, etc., and said Isaac J. Lewis.

Even if this claim were true (which we deny) for the reason that the question of an actual copartnership does not concern the Shainwalds, but is one in which the said *Isaac J. and Harris Lewis*

are alone interested, as the fact of Ralph L. Shainwald, being the Receiver of Harris Lewis, would, under no circumstances, make him a partner of Isaac J. Lewis, for the purpose of a dissolution of the firm existing between Isaac J. Lewis and Harris Lewis; the *main issue, the real controversy* herein, namely, the right to the property, or its proceeds described in the complaint, would not be disposed of. For supposing Isaac J. Lewis and Harris Lewis were in collusion with the Shainwalds, or either of them, and said Shainwalds, or either of them, had, without the knowledge of Coleman or the *bona fide* creditors of the copartnership of which said Isaac J. and Harris Lewis were members. procured a judgment against said Harris Lewis individually in a foreign Court, and in this action, without Coleman being made a party thereto, by virtue of some understanding with the Lewises, said Shainwalds, or either of them, were to succeed in the absence of Coleman to establish the fact that there never had existed a partnership agreement between Isaac J. Lewis and Harris Lewis, would that entitle the Shainwalds, or either of them, to all the property which had come into the possession of Isaac J. Lewis and Harris Lewis *from third parties, merchants, on credit, under the representations from said Isaac J. and Harris Lewis, that they were copartners, and which said merchants had parted with their goods and given them credit under their firm name of H. Lewis & Co., and upon the strength thereof, for a space of twelve months?*

We think that question will surely be answered in the negative.

All these questions as to when there can be a final determination of a controversy between indispensable parties to it, and of different States has been fully discussed in a most able and learned opinion of His Honor Judge Lorenzo Sawyer, Judge of the United States Circuit Court for the Ninth Judicial Circuit, in the celebrated case, at least celebrated in that circuit, of *John H. Burke vs. James C. Flood, et. al.*, decided on the 26th day of January, 1880, in which the said learned Judge said: "If it can be seen that under any "aspect of the case that may reasonably be presented, there "may be reasonable ground to prosecute an action for contribu- "tion, then any determination as to an accounting in the proceed- "ing where all the parties interested are not present and bound "by the determination, cannot be regarded as a *final* determina- "tion as to those parties within the meaning of the statute author- "izing the removal of the case."

Burke v. Flood, Federal Reporter, vol. 1, March to May, 1880, pages 550-551.

We think this decision sets at rest the claims that there can be a *final* determination of this action or controversy therein without said Abraham Coleman, who so far as the Shainwalds and those claiming under them are concerned, is a party plaintiff in this action and with an interest adverse to them and against whom a removal would have to be made, and could not under said second clause of the second section of the Act of 1875 aforesaid, as above construed, because he is a citizen of the *same State* as said Shainwalds, who petition for a removal; nor without said Harris Lewis, who is also an indispensable party under the last aforesaid decision to the suit for dissolution of the copartnership existing between him and the said Isaac J. Lewis, and is also a citizen of the *same State* with the Shainwalds and as to them is a party *plaintiff* herein, and against whom also a removal would have to be made.

If it is claimed that there is a controversy between B. C. Thomas as Sheriff of Lander County, State of Nevada, holding said property described in the complaint under the attachment levied at the suit of H. Shainwald as assignee, &c., against Harris Lewis as aforesaid, and any of the other parties hereto, and that it can be finally determined between them in the United States Circuit Court for the District of Nevada, we maintain that there *cannot* be a *final* determination of any controversy between said Thomas and any of the parties hereto that will be such a controversy as is contemplated by the language of said second clause of said second section of the Act of 1875, as above construed;

First, because it is admitted that said Thomas has no interest in this action whatsoever; and

Second, because Isaac J. Lewis, the defendant in error herein, is bound to be an indispensable party to said controversy claiming a surplus, if any there be, under the decision in *Burke vs. Flood*, aforesaid; and as a removal would have to be had against him, said Isaac J. Lewis, and he is of the *same State* as said Thomas, namely, the State of Nevada, said cause could not be removed.

We go further and say that said Herman Shainwald is not either a *necessary or indispensable party to the controversy* in this action, for the following reasons:

The complaint in the suit of said Herman Shainwald, as assignee, against said Harris Lewis, on which the attachment was levied on

the property described in the complaint herein, alleges that on the 22d day of November, 1880, Ralph L. Shainwald took into his possession, as Receiver for the District Court of Nevada, the property in the complaint alleged (meaning the complaint in said attachment suit). The Shainwalds' petition for removal and answer show that the defendant B. C. Thomas is the duly authorized Sheriff of Lander County, State of Nevada, and as such levied an attachment on said property on December 13, 1880, being prior to the commencement of this action, and is in possession thereof "jointly" with said Receiver, the said attachment being in the action in the Fifth District Court of Nevada, wherein said Shainwald, as assignee in bankruptcy, is plaintiff, and said Harris Lewis is defendant; and said action being predicated upon a judgment recovered by said Herman Shainwald, as assignee, &c., against said Harris Lewis in the District Court of the United States for the District of California, wherein such Receiver is appointed. Defendant Thomas, as such Sheriff, has appeared and answered. And we say that he, having seized the said property under and by virtue of the attachment aforesaid, as the property of the defendant Harris Lewis in the action wherein said Herman Shainwald, as assignee, etc., is plaintiff, and Harris Lewis is defendant, it became, indeed, necessary and indispensable to make said Thomas a party to this action, to determine his right to seize and hold the property by virtue of said attachment. By reason of said attachment and suit, said Herman Shainwald was not then, nor is he now, an indispensable party to this action, for the Sheriff, for the purpose of sustaining his levy, would have a right, and it would be his duty to make such defense as Shainwald now offers in this action; as in an action-at-law by "A" against "B" the Sheriff of Lander County, for the seizure of property belonging to "A," by virtue of an attachment in an action between "C" and "D." Quære Could "C" intervene in said action and claim that the property was not the property of "A," but of "D." We say he could not And if it can be said that he might be made a party to said action by reason of his direction to the Sheriff to make such seizure, he would surely not be an *indispensable* party to that suit.

Herman Shainwald's rights to the possession of said property were relinquished to the Sheriff; he having chosen his forum in said Court last named in bringing an action on the judgment recovered by him against Harris Lewis, and causing an attachment to be issued, there cannot be a joint possession by him with the

Sheriff who levied the attachment at his request.

Wingard vs. *Banning*, 39 *Cal.*, 549.

Again, upon that point: Suppose it should be established that no partnership existed at all, or that that partnership incurred no debts, as is alleged, or that the property was not the property of H. Lewis & Co., but of Harris Lewis individually, would not the property revert to the *Sheriff of Lander County* who held the same by virtue of the *attachment* in favor of said Shainwald? And would not the *Sheriff* hold the same, subject to the determination of the action wherein the same was attached? Or would not the said Sheriff, by reason of his attachment, be entitled to any surplus remaining in favor of H. Lewis & Co., in case the liability of the firm as such were established and a decree of dissolution and distribution of the firm's assets had in this action?

And again, could the United States Circuit Court assume to try the action pending in the State Court between Herman Shainwald, as assignee, &c., and Harris Lewis, wherein said attachment was issued? For that would necessarily follow if the attachment were to be ignored.

We think we have thus conclusively shown that the cause could not be removed under the second clause of said second section of said Act of 1875.

POINT V.

THE APPEARANCE OF H. T. CRESWELL ON BEHALF OF DEFENDANTS ABRAHAM COLEMAN AND HARRIS LEWIS BEING UNAUTHORIZED, AND THE RIGHT TO PETITION FOR THE REMOVAL OF SAID CAUSE BEING DENIED BY THEM AS APPEARS BY THE AFFIDAVITS OF HARRIS LEWIS AND H. H. LOWENTHAL, THIS WE CLAIM DESTROYS THE FORCE AND EFFECT OF THE ENTIRE PETITION FOR REMOVAL.

Pages 32 and 33, printed transcript of Record.

POINT VI.

THE APPEAL SHOULD BE DISMISSED, AND THE ORDER OF THE CIRCUIT COURT REMANDING THIS CAUSE SHOULD BE AFFIRMED, AS IT APPEARS FROM THE PLEADINGS AND PROCEEDINGS HEREIN THAT THE APPEAL HEREIN WAS TAKEN SOLELY FOR DELAY.

The appeal should be dismissed, and the order remanding the cause to the State Court should be affirmed with costs.

Respectfully submitted,

ALBERT BACH,

Counsel for Defendant in Error.

108-158

OFFICE SUPREME COURT U.S.
FILED
MAR 15 1883
JAMES H. McKENNEY, Clerk.

SUPREME COURT OF THE UNITED STATES.

No. 976.

RALPH L. SHAINWALD, RECEIVER, &C., AND HERMAN SHAINWALD, ASSIGNEE, &C., INTERVENORS; J. A. WRIGHT, ISAAC HOFFMAN AND S. HOFFMAN, COMPOSING THE FIRM OF HOFFMAN BROTHERS, ET AL.,

Appellants,

VS.

ISAAC J. LEWIS.

SUPPLEMENTAL BRIEF AND POINTS

Of Defendant in Error, in Reply to Appellants' Brief.

ALBERT BACH,

Counsel for Defendant in Error.

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SUPREME COURT OF THE UNITED STATES.

NO. 976.

RALPH L. SHAINWALD, Receiver, &c., and HERMAN SHAINWALD, Assignee, &c, intervenors; J. A. WRIGHT, ISAAC HOFFMAN and S. HOFFMAN, comprising the firm of HOFFMAN BROS., ET AL.,
Appellants,

vs.

ISAAC J. LEWIS.

Supplemental Brief and Points of Isaac J. Lewis, Defendant in Error and Appellee herein.

In submitting the following additional brief and points in reply to appellants' brief herein, we beg leave to state that we do so, because, notwithstanding that we believe and venture to assert that our original brief covers the substantial questions on this appeal, still we do not deem it advisable to allow to go uncontradicted and unexplained certain allegations, assumptions and hypothetical cases in appellants' brief set forth, nor to permit to remain undisputed appellants' conclusions, which appear to us to be based on and deduced from said allegations, assumptions and hypothetical cases. Appellants' brief was not delivered to us until after our original brief had been printed.

THE ALLEGATIONS OF FACT IN APPELLANTS' BRIEF MAY BE DIVIDED INTO TWO CLASSES.

1st. Those *dehors* the transcript of record herein.

The allegations in subdivisions 1 and 2 above, find their own contradiction out of the mouths of the appellants herein in their answer and petitions for intervention and removal (fols. 16, 21 and 22 and 53, transcript of record, and on page 4, appellants' brief herein). These allegations under subdivisions 1 and 2 above, also find their contradiction in the very facts as they appear from the petitions and pleadings herein, for Ralph L. Shainwald and the Sheriff, Thomas, held said partnership property (wrongful though their holding was) for identically the same purpose, viz., in order thereout to satisfy the judgment of Herman Shainwald as assignee, &c., against the individual Harris Lewis, and certainly therefor their holding must necessarily have been under a common interest.

The allegation under subdivision (3) above is fully contradicted in folios 4 and 5, transcript of record.

THE APPELLANTS URGE TWO REASONS WHY THE ORDER REMANDING THE CAUSE HEREIN SHOULD BE REVERSED.

A. The substantial controversy, the real contest in this suit, is between the plaintiff, a citizen of the State of Nevada, and Ralph L. Shainwald, a citizen of the State of California (Point I., appellant's brief herein, page 11).

B. The controversy between the plaintiff, a citizen of Nevada, and Ralph L. Shainwald, a citizen of California, is a separate and distinct controversy, to which none of the other defendants is a necessary or indispensable party.

In addition to what we have stated in our original brief herein, which we believe refutes the above propositions, we respectfully submit that appellants' brief herein shows the said propositions to be conclusions whose premises are founded neither on the facts of the case, as they appear from the record on appeal herein, and as they are in truth, nor are they in any way deducible from said facts.

These premises consist of the allegations to which we have above replied, and of hypothetical cases based on assumptions appearing on nearly every page of appellants' brief herein, and which appellants seem to think are admitted and may be taken

for granted, but which we respectfully submit, are both denied, and unsustained by the facts of the case at bar and the adjudications thereon already had herein.

IT IS ASSUMED BY APPELLANTS:

I. That the property in litigation is property of Harris Lewis; that it was seized by or surrendered to the agent and employee of Ralph L. Shainwald, in his capacity as Receiver of the United States District Court for the District of California; that the taking, holding and possession of said Ralph L. Shainwald through his agents was lawful and exclusive; that said Ralph L. Shainwald is the sole and only owner thereof and the only party, outside of plaintiff, who claims or has any right, title or interest therein and thereto, and that said Ralph L. Shainwald's title is "good against all the world."

II. That the allegations of the complaint, which are made merely to show the necessity of a dissolution of the partnership by reason of the wrongful acts of the Shainwalds and their employees and representatives, and those asserting rights and doing wrongs under cover of the alleged legality and strength of the claim of the Shainwalds, and which are made also in order to bring the property into Court and have the rights of *firm creditors* and all other parties therein determined, changes this equity suit into a common law action for conversion.

III. That Harris Lewis has no rights in a court of equity to protect his firm creditors and relieve himself against firm indebtednesses for which he is liable notwithstanding his assignment to Ralph L. Shainwald, simply because he involuntarily made an assignment of his individual property to said Ralph L. Shainwald in aid of a personal judgment against said Harris Lewis in favor of Herman Shainwald.

IV. That a court of equity would make a decree as between Ralph L. Shainwald and defendant in error herein which must vitally affect, nay actually determine the rights of Abraham Coleman, a party defendant herein, and which decree could not be made without so doing, in the absence of said Coleman, and that said decree would be binding on Coleman.

V. That alleged the rights of Ralph L. Shainwald will not be fully protected in this equitable action to which he is a party, when it is tried in the State Court.

VI. That the alleged right of Ralph L. Shainwald to have this cause tried in the United States Court is superior to the rights of defendants in error herein and Harris Lewis and Abraham Coleman, who, so far as the removal of this cause is concerned, are plaintiffs herein, to have it tried in the State Court.

VII. That defendant in error herein and Abraham Coleman and Harris Lewis fraudulently attempt, by bringing this action in the State Court, to evade Federal jurisdiction.

VIII. That Ralph L. Shainwald stands in a better position as to the property in litigation than Harris Lewis, his assignor.

IX. That said property was not held jointly by Ralph L. Shainwald and Sheriff Thomas under a common interest, viz.: Herman Shainwald's claim to said property in satisfaction of his judgment against Harris Lewis, and that so far as the question or controversy as to right to possession of said property is concerned, said Thomas, who is a resident of the State of Nevada, the same State as that of which defendant in error is a resident, and who joins in the petition for removal, would not be an indispensable party defendant as against defendant in error herein, to the determination of the alleged controversy as to possession.

X. That Abraham Coleman's rights and claim are not fully set forth in the complaint, and that because said Coleman acquiesces in the allegations of said complaint so far as they refer to him, and does not deny them by way of answer, that therefore he has no rights herein, and claims none.

XI. That the only object of an action of this character should be to dissolve the partnership, and go no further as to accounting, marshalling assets, distribution, &c.

XII. That said Ralph L. Shaniwald was not a trespasser, after the United States District Court for the District of Nevada, under whose appointment alone said Ralph L. Shaniwald took possession of the property in litigation through Mr. Crittenden, his alleged agent for that purpose, had set aside and vacated its own order of appointment of said Ralph L. Shaniwald and adjudicated said property to be partnership assets and directed said Shaniwald to deliver up possession thereof to the partnership firm herein, and after the State Court, in which this case is now pending, had also adjudicated said property to be partnership assets and directed said Shainwald and his agents to give up

possession thereof to Joachimsen, its receiver, and after said Shainwald's agents holding possession for him had been served with the orders vacating his appointment and directing them to deliver up possession.

XIII. That the petition and order on application for removal herein were made on the ground that there was a *separable* controversy in this suit, to which Ralph L. Shainwald and Isaac Lewis, defendants in error herein, are alone parties, and that it could be fully determined as between them.

IN REPLY TO THE ABOVE ASSUMPTIONS WE RESPECTFULLY SUBMIT:

1st. That the property in litigation is copartnership property, as alleged in the complaint herein, and that there have been adjudications on that point herein in the United States District Court for the District of Nevada, when the Judge thereof vacated the order which had been made by him, appointing said Ralph L. Shainwald receiver of Harris Lewis's property in Nevada. This is alleged in the complaint (fols. 3-4-5, transcript of record), and is not denied in the answers or any of the petitions herein. And there has also been an adjudication upon that point in the State Court herein in which this suit is pending (fols. 28, 42, 44 and 45, transcript of record). That it was decided by Judge Hoffman of the United States District Court for the District of California in the case of Shainwald, as assignee, &c., vs. Harris Lewis, in the pleadings herein mentioned, that the property in the State of Nevada, spoken of by counsel for appellants in their brief, and taken possession of under the circumstances related in the bill of complaint herein, was so taken and held by Mr. Crittenden, one of appellants' counsel herein, as agent of Ralph L. Shainwald, in his exclusive capacity as Receiver of the District Court of the United States for the District of Nevada; and, inasmuch as the said District Court for the District of Nevada made an order in said action removing said Shainwald as Receiver as aforesaid, revoking his appointment, and directing him to return to H. Lewis & Co., the partnership herein, all the property herein in the State of Nevada, and in the complaint described, we do not see why counsel for appellants should endeavor to lead this Court to believe a different state of facts. That said Ralph L. Shain-

wald could not have held the property under his appointment by the United States District Court for the District of California, it being beyond the jurisdiction of said Court. That the holding of said Ralph L. Shainwald and said Sheriff Thomas was joint and in the common interest of Herman Shainwald, the judgment creditor of Harris Lewis, as we have shown above; and that therefore said Thomas would be an indispensable party defendant, so far as defendant in error herein is concerned, in regard to the removal of this cause on the ground of the said alleged separable controversy as to the right of possession; and as said Thomas is a citizen of the same State as defendant in error herein, Isaac J. Lewis, viz., Nevada, said removal could not be had. That the claim and rights of Abraham Coleman fully appear in the complaint herein.

2d. The complaint shows the nature of this action. Harris Lewis and Abraham Coleman are necessary and indispensable parties in any and all controversies between Ralph L. Shainwald and defendant in error, Isaac J. Lewis. No court of equity could make a decree herein as between Ralph L. Shainwald and Isaac J. Lewis, defendant in error herein, which would not necessarily involve and determine the rights of Harris Lewis and Abraham Coleman. No court of equity would make such a decree in the absence of said Harris Lewis and said Coleman.

The rights of Ralph L. Shainwald will be fully protected in the State Court. There is no effort on the part of defendant in error herein, or Harris Lewis, or Abraham Coleman, to evade, fraudulently or otherwise, Federal jurisdiction; there is nothing herein showing that there is; there is no reason why there should be. Defendant in error herein is merely insisting on his right to try this cause in the Court of the State of which he is a citizen, which is perfectly proper. We also refer to our original brief and the following authorities —

WE RESPECTFULLY SUBMIT THE FOLLOWING ADDITIONAL AUTHORITIES TO SUPPORT OUR ASSERTIONS:

"All persons materially interested, either legally or bene-
" ficially, in the subject matter of a suit are to be made parties
" to it, either as plaintiffs or as defendants, however nu-
" merous they may be, so that there may be a complete de-
" cree which shall bind them all. By this means the Court is

" enabled to make a complete decree between the parties to pre-
" vent future litigation by taking away the necessity of multi-
" plicity of suits and to make it perfectly certain that no injus-
" tice is done, either to the parties before it or to others, which
" might otherwise be, grounded upon a partial view of the
" real merits. Those who have an interest in the object of the
" suit are ordinarily required to be made parties."

Schenck vs. Ingraham, 5 Hun, 402, 403.
Dennison vs. League, 16 Tex., ~~300.~~ 400
O'Shea vs. Twohig, 9 Tex., 336.
Story Eq. Pl., § 72.
Cooper Eq. Pl., Ch. 1, p. 34.
Mitf. Eq. Pl., 163, 164.

" If complete justice between the parties before the Court
" cannot be done without other parties being made, whose
" rights or interests will be prejudiced by a decree, the Court
" will altogether stay its proceedings, even though those others
" cannot be brought before the Court."

Story Eq. Pl., § 77.

" A Court can make no decree in an equity suit which so in-
" volves the interests of a person not a party to the suit that
" complete justice between the parties cannot be done without
" affecting his rights."

Shields vs. Barrow, 17 How., 130. U. S. R.

" In cases of the seizure of the joint property for the separ-
" ate debt of one of the partners, a question has arisen how far
" a court of equity would interfere upon a bill for an account
" of the partnership to restrain the sheriff from a sale, or the
" vendee of the sheriff from an alienation of the property seized
" until the account was taken and the share of the partner as-
" certained. * * * If the debtor partner has, or will have,
" upon a final adjustment of the accounts, no interest in the
" partnership funds, and if the other partners have a lien upon
" the funds not due to them, it may most materially affect their
" rights whether a sale take place or not. For it may be ex-
" tremely difficult to follow the property into the hands of
" the various vendees; and their lien may, perhaps, be
" displaced, or other equities arise, by intermediate *bona fide* sales
" of the property by the vendees to other purchasers without
" notice, and the partners may have to sustain all the chances of

" any supervening insolvencies of the immediate vendees. To " prevent multiplicity of suits and irreparable mischief, and to " insure unquestionable liens, it would seem perfectly right in " cases of this sort to restrain any sale by the sheriff, and " besides it is also doing some injustice to the judgment debtor, " by compelling a sale of his interest under circumstances in " which there must generally, from its uncertainty and litigious " character, be a very great sacrifice and injury. *If he has no* " *right in such a case to maintain a bill to save his own interest,* " *it furnishes no ground why the Court should not interfere in* " *his favor through the equities of the other partners.* This " seems to be the true result of the English decisions on this " subject, which do not distinguish between the case of *an as-* " *signee* of a partner, and that of an executor or administrator " of a partner, or of the sheriff, or of an assignee in bank- " ruptcy."

Story Eq. Jur., § 678.

" When there is a contemplated dissolution of a firm, so that " the effects of the partnership may be wound up, it is necessary, " in order that the rights of all the parties interested in the firm " assets should be adjudicated upon, that they be brought before " the court of equity and the assets marshalled."

Story Eq. Jur., § 671 and note, and § 672.

Action for dissolution and accounting proper remedy even after voluntary dissolution.

Babcock vs. Hermance, 48 N. Y., 683.

A dissolution of a copartnership does not destroy the joint tenancy of partners in partnership property. The partnership with all its incidents continues for the purpose of settling partnership concerns and until that is effected.

Murray vs. Mumford, 6 Cow., 441.
Burns vs. Nottingham, 60 Ill., 531.

" An assignment by one partner of his share in the common " stock simply transfers the interest he may have in any sur- " plus remaining after payment of the firm debts and the settle- " ment of all accounts, nor can the partnership effects be taken " by attachment or sold on execution to satisfy a creditor of one

" of the partners, except to the extent of such interest. The " remaining partners are entitled to the control of the firm prop- " erty and to apply it to the payment of its debts. Where a part- " ner sells his interest to a stranger, or it is sold upon execution " against him, his right to have the partnership debts paid and " his liability therefor discharged out of the property is not di- " vested by the sale. This right is not affected by the fact that " the separate interests of all the parties are thus disposed of. " The *corpus* of the effects is joint property, and neither partner " separately has anything in that *corpus;* but the interest of " each is only his share of what remains after the partnership " debts are paid and accounts are taken."

Menagh vs. Whitwell *et al.*, 52 N. Y., 158, and cases cited.

" Purchasers of the share of an individual partner can only " take his interest. That interest, and not a share of the part- " nership effects, is sold, and it consists merely of the share of " the surplus which shall remain after the payment of the debts " and settlement of the accounts of the firm."

Id., 158.

" No more property can be carried out of the firm by the as- " signee of one partner than the partner himself could extract " after all the accounts are taken."

Id., 159.

" No person deriving under a partner can be in a better con- " dition than the partner himself."

Id., 159.

" A partner has no right by an assignment of his interest to " take from the creditors or other partners the right to have their " claims against the partnership satisfied out of its property."

" When a copartner sells " (or assigns) " to a stranger not " liable for his debts, or his interest is sold on execution, is not " the right to have the debts paid out of the property a right of " indemnity personal to himself, and which does not pass by the " sale? Could it be tolerated that the interest of a partner " should be sold under the execution against him on which sale " only the value of his interest in the surplus could be realized, " and that the purchaser should be allowed to take the corpus

" of the property and leave him liable for the debts? If the " legal effect of the transfer was set forth in the instrument it " would be seen that all the purchaser acquired was a right to an " account and to the partner's share in the surplus after payment " of the debts when ascertained, and that he had no right to that " part of the property which was required for the payment of " debts, that the sale was subject to the debts (3 K. Com, 76, 78). " *The partner whose share was sold would manifestly have an* " *interest in the protection and appropriation of that part of* " *the property in discharge of his own liability to the firm cred-* " *itors.*"

Rapallo, J., in Menagh vs. Whitwell *et al.*, 52 N. Y., 161.

Judge Allen in this same case, writing a separate opinion, agreeing with Judge Rapallo, says:

" It is said that partners have a lien on the property for the " payment of the firm debts, and that creditors have a *quasi* " lien, and by means of this and through the lien of the part- " ners they work out an effectual remedy against the property" citing *Ex parte* Williams, 11 Ves., 4, and Story on Partnership, §§ 360, 361.

" Partnership debts have in equity an *inherent* priority of " claim to be discharged from the joint property."

3 Kent's Com., 64.

" The assignee of a partner's interest cannot withdraw his " share of the joint effects. They must remain in the posses- " sion of the continuing partners for the purpose of winding up " the partnership which has been dissolved by the assignment."

Horton's Appeals, 13 Penn. St. R., 67.

" In case of a dissolution each partner holds the joint prop- " erty clothed with a trust to apply to the payment of the joint " debts, and subject thereto, to be distributed among the part- " ners according to their respective shares therein."

Story on Part., § 360.

"So long as the property continues, the firm creditors may " assert their priority of right to it as against the creditors or " transferees of individual partners."

Allen vs. Center Valley Co., 21 Conn., 130.

"It is joint *quoad* the partners and the firm creditors so long "as any one of the partners may insist upon the partnership "claims to it."

Crawshay vs. Collins, 15 Ves., 237.
Peacock vs. Peacock, 16 *Id.*, 57.

"Partnership property must be subjected first to the pay- "ment of partnership debts; the creditor of an individual part- "ner cannot obtain priority by an attachment, but the creditor "simply acquires a lien upon the defendant's interest, the ex- "tent of which must be determined by equitable proceedings."

Cox vs. Russell, 44 Iowa, 556.

"When an accounting is taken, at winding up a copartner- "ship between partners, each partner is entitled to be allowed, "against the other, everything he has advanced or brought in "in a partnership transaction, subject to the rights of joint "creditors, and to charge his copartner in the account with "what he has failed to bring in, and with what he has abstract- "ed from the joint funds beyond his just proportion; and noth- "ing will be considered as the share of any of them but "that proportion of the residue to which each, on a balance "of the account so taken, may be ascertained to be entitled."

Moore vs. Wheeler, 10 W. Va., 35.

"Where one of two partners sells to a third person his in- "terest in the goods owned by the partnership, the sale dis- "solves the partnership, and the purchaser cannot maintain an "action to recover his interest in the goods, but must sue for "an accounting, and will recover whatever his assignor would "have been entitled to upon a settlement of the partnership ac- "counting; and until the affairs of the partnership are thus "wound up. the partner who did not sell is entitled to the pos- "session of the property.

Miller vs. Bugham, 50 Cal., 615.

In answer to the case of Barney vs. Latham (103 U. S. Reports), cited by counsel for appellants, we would respectfully submit: 1st. That the removal herein was not had on the ground set forth in Barney vs. Latham; and, 2d. The decision in that case is entirely inapplicable to the issue as disclosed by the pleadings in this case.